Supreme Court, U.S.
FILED
MAR 23 1998
CLERK

No. 97-1342

In The

Supreme Court of the United States

October Term, 1997

R. KEITH CULLINAN and
CULLINAN ASSOCIATES, INC.,

Petitioners,

vs.

JERRY E. ABRAMSON, CHRISTINA HEAVRIN, STUART P. JAY, EARL MAC UNGER, JOHN H. NEVIN, WILLIAM C. BOONE, GREENEBAUM, TREITZ, BROWN AND MARSHALL, SAMUEL D. HINKLE and CULVER V. HALLIDAY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

While this case comes before the Court from the Respondents' assertions of qualified and absolute immunity defenses raised in motions to dismiss, it does not come in the normal Rule 12 context of a blank slate writ only with a completely untested complaint. Instead, many of the factual allegations on which Petitioners' claims rest arise out of six prior lawsuits, all addressing in some fashion or other concerns raised by the City of Louisville over the Petitioners' fiscal mismanagement of the City of Louisville Policemen's Retirement Fund.

The essence of Petitioners' claims in this case was that the two lawsuits brought by the City, in which Petitioner Keith Cullinan was named as a defendant, were frivolous and retaliatory. Petitioners' opinion of the City's lawsuits was not shared by the Kentucky Supreme Court which reversed the dismissal of the first of those two cases for lack of standing. The Court found that the City had appropriately filed the lawsuits inasmuch as it had the "duty, in the interest of sound public policy, to guarantee that active police officers have a dependable pension plan, one free of waste and mismanagement." *City of Louisville v. Stock Yards Bank & Trust Co.*, 843 S.W.2d 327, 329 (Ky. 1992). And that case was thereafter settled with the City receiving compensation from Mr. Cullinan's former employer, Stock Yards Bank, for losses to the Pension Fund resulting from Mr. Cullinan's management.[1]

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[1] Petitioners for the first time in their Petition state that these lawsuits were "unilaterally dropped . . . because there was no evidence to support" the claims against them. Petition at p. 5. This is not true. Even the Petitioners' Complaint acknowledges that the cases were settled and Appendix E at pp. 137a-141a and

Still, the case does, in its voluminous detail, come before the Court from Rule 12 motions that did not attempt to answer the factual allegations of the Petitioners' 33-page Complaint, reproduced here in the Appendix at App. 1-38. While the Respondents wholeheartedly disagree with the Petitioners' characterization of the events underlying their claims, the accuracy or inaccuracy of the Complaint's allegations could not be raised below and is not material here.

For purposes of the appeal, the allegations of the complaint were taken as true by the Sixth Circuit which expressed approval of the "commendably fact specific" complaint and affidavit, from which it was able to determine that the individual defendants were entitled to qualified immunity for their roles in filing and pursuing the lawsuits in which the Petitioners were parties. This conclusion was undoubtedly correct given the indisputable fact that the City authorized the filing and litigation of these lawsuits and a city cannot act except its agents. Moreover, given the ethical restrictions on who can practice law, neither can a city litigate lawsuits other than through its lawyers.

As the agents of the City of Louisville carrying out the City's directives in all the events described in the Complaint, Respondents are individually immune from liability on Petitioners' claims. In so finding, the Sixth Circuit did not stray from the standards set by this Court for analyzing qualified immunity claims, did not indulge in an improperly lax standard, followed this Court's guidance in determining that private attorneys employed by the City to litigate its claims were entitled to the same

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151a-154a contain the settlement agreement and a newspaper article publicizing the settlement.

immunity as attorneys on the City's payroll, and ruled consistently with its own prior decisions and decisions of all other courts addressing the issue of qualified immunity to RICO claims.

The Petition raises a virtual smorgasbord of issues relating to the grant of immunity to the individual Respondents. What is missing from the five attempts to interest this Court in Petitioners' case, however, is any argument that even comes close to asserting an issue worthy of a grant of certiorari. The claim that two issues raise conflicts in the circuits is simply untrue. The remaining issues erroneously assume that this is a United States Court of Appeals that would even consider reviewing decisions for alleged misapplication of a rule of law. No issue is raised in the Petition that either should be settled by this Court or was decided by the Court of Appeals in a way that conflicts with any relevant decisions of this Court. Accordingly, no issue is raised that would be appropriate for review by this Court.

ARGUMENT

I.

THE SIXTH CIRCUIT CORRECTLY RELIED ON ESTABLISHED PRECEDENT FROM THIS COURT TO GRANT QUALIFIED IMMUNITY TO THE CITY'S OUTSIDE COUNSEL.

In asking this Court to exercise its discretionary authority to review this case, Petitioners complain that the Court of Appeals erred in finding the City of Louisville's outside counsel eligible for qualified immunity. Petitioners' complaint is in reality, however, not with the Court of Appeals' decision but with the clear language and guidance on the issue of governmental immunity that this Court recently provided in *Richardson v.*

McKnight, ___ U.S. ___, 138 L.Ed.2d 1032, 117 S.Ct. 2100 (1997).

The Court of Appeals correctly relied on *Richardson v. McKnight* to find that history and policy require that attorneys working for and under the direct supervision of the City in this case be afforded the same immunity as the City's in-house counsel performing the same governmental function.[2] In *Richardson*, this Court refused to recognize a qualified immunity for employees of a private prison corporation hired to manage a state correctional center. In so holding, the Court looked first to history, which it concluded reveals no tradition of immunity for privately employed prison guards. *Id.* at 2104 (finding that private contractors frequently took complete control over prison management in the 19th Century). This Court's obviously extensive historical research uncovered that private lawyers hired by a governmental entity are another story.

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[2] The Court of Appeals held:

> As the Supreme Court recently had occasion to note, it appears that the common law "*did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign." *Richardson v. McKnight*, ___ U.S. ___, 117 S.Ct. 2100, 2105, 138 L.Ed.2d 540 (1997) (citations omitted) (emphasis in original). As Attorneys for the city, GTB & M et al. were clearly acting as the city's agents. The rationales for qualified immunity apply to these lawyers and their firm in about the same way they apply to defendant Heavrin, Louisville's sometime law director. We see no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel.

Cullinan v. Abramson, 128 F.3d 301, 310 (6th Cir. 1997).

> Apparently the law **did** provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign. But we have found no indication of any more general immunity that might have applied to private individuals working for profit.

Id. at 2105 (citations omitted) (emphasis in original).

In their Petition seeking a review of this case, Petitioners Cullinan and Cullinan Associates, Inc. directly challenge the Supreme Court's research results in *Richardson*: "In sum, there is no common law precedent entitling private fee based attorneys to immunity from suit."[3] Petition at 11. This differing opinion as to an issue already addressed by the United States Supreme Court, however, is no ground for requesting a writ of certiorari in this case. *See* Sup. Ct. R. 10. The Court of Appeals explicitly, and appropriately, relied on the Supreme Court's conclusion that there is historical evidence supporting immunity for private attorneys carrying out governmental functions.

From a pure policy standpoint, the Sixth Circuit held that "[t]he rationales for qualified immunity apply to these [outside] lawyers and their firm in about the same way they apply to defendant Heavrin, Louisville's

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[3] Petitioners fault the Supreme Court's observations in this regard based on an English barrister/solicitor dichotomy. Of questionable relevance, and accuracy, their theories do not change the fact that the *Richardson* court found at least enough common-law evidence of immunity to distinguish private attorneys hired by a sovereign from the private prison guards denied immunity in *Richardson*.

sometime law director."[4] *Cullinan*, 128 F.3d at 310. Contrary to Petitioners' assertion, the Court of Appeals' holding comports completely with the Supreme Court's policy analysis in *Richardson*. The fact that the analysis required an opposite conclusion when applied to these private attorneys working for the City and under its direct supervision is neither ironic, as Petitioners state, nor in conflict with precedent.

The private prison guards who were denied qualified immunity in *Richardson* worked for a "large, multistate private management firm" which is "systematically organized to perform a major administrative task for profit" and "perform that task independently, with relatively less ongoing direct state supervision." *Richardson*, 117

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[4] In requesting this Court's review, Petitioners do not challenge the maxim that governmental in-house attorneys are entitled to immunity for their role in prosecuting civil actions on behalf of the governmental entity, as well they could not. As Respondents set forth fully below, incidents of courts granting immunity to government attorneys and officials who initiate and prosecute civil lawsuits for the public welfare are legion. *See Spear v. Town of West Hartford*, 954 F.2d 63 (2d Cir. 1992) (town manager and town attorney who respectively authorized and initiated suit against local newspaper immune from newspaper's subsequent claims of malicious prosecution and violation of First Amendment and due process rights); *Shoultes v. Laidlow*, 886 F.2d 114 (6th Cir. 1989) (City Attorney entitled to absolute immunity in bringing civil injunction action to enforce zoning ordinance); *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668 (7th Cir. 1985) (state Attorney General immune for reviewing state contracts); *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1998) (Commissioner of State Department of Health immune from claims that she failed to initiate civil procedures concerning jail conditions); *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir. 1984) (Deputy Attorney General immune from suit for participation in license revocation proceedings).

S.Ct. at 2106. The Supreme Court looked to the purposes underlying governmental immunity and found none would be furthered by extending immunity to these privately-employed prison guards.[5]

The *Richardson* Court stressed that it had "answered the immunity question narrowly" and solely in the context of a private firm "systematically organized to assume a major lengthy administrative task . . . with limited direct supervision." *Id.* at 2108. The Court's holding did not extend to individuals working for a governmental body: "The case does not involve a private individual briefly associated with a governmental body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id.* at 2108.

The Sixth Circuit correctly applied the *Richardson* policy standard to recognize qualified immunity for the private attorneys and their firm in this case. As it necessarily decided, unlike the employees of the private prison management firm, the City's outside attorneys in this case were not operating autonomously. While they were sometimes required to exercise their independent judgment and discretion, the private attorneys nonetheless were bound by the City's decisions on significant strategic actions. *See* Kentucky Rules of Professional Conduct Rule 1.2 ("A lawyer shall abide by a client's decision

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[5] The *Richardson* Court described the purpose of the immunity doctrine as

> protecting "government's ability to perform its traditional functions" by providing immunity where "necessary to preserve" the ability of government officials "to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service."

Id. at 2105 (citing *Wyatt v. Cole*, 504 U.S. 158, 167 (1992)).

concerning the objectives of representation . . . and consult with the client as to the means by which they are to be pursued.").

In addition, the private attorneys were but briefly associated with the City of Louisville. Again unlike private prison guards, they were not systematically organized to manage an institution such as a state correctional institute. The private attorneys were for all effects and purposes the same as the City's in-house attorney. Indeed, in the underlying litigation, the City spoke and acted through Hinkle, Halliday and Boone, the members of the former law firm, GTB&M.[6] These attorneys served as co-counsel of record with the City's in-house counsel, Heavrin. As the Sixth Circuit realized, it would make no sense to grant immunity to the City's in-house attorney but to deny it for these private attorneys and their firm who were performing exactly the same tasks. Both need protection from meritless suits in order to vigorously protect the public's interest.

The Sixth Circuit's refusal to distinguish between a governmental entity's outside and in-house counsel when both are performing the same public services and under the same governmental control is supported by other recent decisions of this Court.

> As our opinions have made clear, immunities are grounded in "the nature of the function performed, not the identity of the actor who performed it."

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[6] The individually named Defendants, Hinkle, Halliday and Boone, were the only members of the firm actively involved in the litigation. The firm itself and the remaining partners are potentially liable only vicariously.

Clinton v. Jones, 520 U.S. ___, 137 L.Ed.2d 945, 117 S.Ct. 1636, 1644 (1997) (citing *Forrester v. White*, 484 U.S. 219, 229-230 (1988)).

In *Clinton* and *Forrester*, the Supreme Court in fact refused to extend absolute immunity to the President and a sitting judge, respectively, for unofficial and unprotected acts. In so doing, the Court looked not so much to the capacity of the person performing the act but to whether the action itself related to the immunity's justifying purposes. *Id.* Indeed, the Supreme Court very recently reiterated this policy with the reverse result, holding that otherwise non-legislative officials *are* entitled to legislative immunity when they perform legislative functions. *See Bogan v. Scott-Harris*, 118 S.Ct. 966, ___, 1998 WL 85313 at *6 (March 3, 1998), citing *Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731-734 (1980). The same rationale applies to the private outside counsel in this case who are performing the same protected functions as the in-house attorneys.

Petitioners cite this Court's decision in *Wyatt v. Cole* for the proposition that "the purpose behind qualified immunity is 'to safeguard government, and thereby protect the public at large, not to benefit its agents.' " Petition at 8 (quoting *Wyatt*, 504 U.S. at 168). This policy statement only further supports the Sixth Circuit's holding below. It matters not whether it is a private outside attorney or an in-house government attorney who pursues a legal matter at the "behest of the sovereign" and under the sovereign's direction. Immunity serves the same purpose of protecting the public's right to unencumbered representation.

There is, therefore, no reason, "compelling" or otherwise, for this Court to revisit the immunity question at issue below. The Sixth Circuit decision granting qualified

immunity to the City's outside attorneys in this case is consistent with the precedent of this Court.

II.

CONTRARY TO PETITIONERS' CONTENTION, *RICHARDSON V. MCKNIGHT* IN NO WAY PRECLUDES THE SIXTH CIRCUIT'S GRANT OF IMMUNITY TO RESPONDENT JAY.

Among the numerous government officials and agents sued by Petitioners in this action is Respondent Stuart Jay. Petitioners allege in their Complaint that Jay was the City of Louisville's Director of Finance and Budget and an *ex officio* member of the police pension fund's board of trustees. Oddly, they seek a writ of certiorari specifically on the ground that the Sixth Circuit ignored Jay's "status as a private person" in granting him qualified immunity.

The Sixth Circuit found that the Petitioner's own "papers leave no room for doubt" that Petitioner Jay was acting in an official capacity when the alleged conduct occurred. *Cullinan*, 128 F.2d at 310. Their own initial allegations notwithstanding, Petitioners complain to this Court that Respondent Jay "illegally" held the office of City finance and budget director because his home was located several hundred feet outside the city limits.[7]

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[7] The Sixth Circuit recognized that Respondent Jay held the position of, and was acting as, Finance and Budget director until 1992, when the residency issue was discovered. Jay then relinquished the official position but continued to serve in a governmental capacity as "special assistant" to the mayor. *Cullinan*, 128 F.3d at 305. The Court held

> (It is undisputed that Jay was functioning both as the finance director and as an *ex officio* member of the

Then, in a theatrical attempt to gain this Court's ear, they liken the Sixth Circuit's grant of immunity to Jay under these circumstances to a grant of immunity to a private citizen impersonating a police officer. Petition at 12. The differences are, of course, manifest and, contrary to Petitioners' purpose, actually illustrate the correctness of the Sixth Circuit's holding.

Unlike the police impersonator, Respondent Jay provided essential governmental services and performed official governmental functions with the full knowledge and countenance of the City. He worked directly for the government, within a system that can only effectively serve the public good through the "vigorous exercise of official authority" and "principled and fearless decision-making." *See Richardson*, 117 S.Ct. at 2105 (citations omitted).

The Sixth Circuit was correct to protect this type of activity. And, contrary to Petitioners' urging, the holding in no way conflicts with this Court's decision concerning the privately employed prison guards in *Richardson v. McKnight*. While the *Richardson* Court recognized a difficulty in employing a "purely functional approach" to certain immunity issues, it did so in the expressly limited context of "a private [prison management] firm, systematically organized to assume a major lengthy administrative task [managing an institution] with limited direct supervision by the government [which] undertakes that

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police pension fund board of trustees – and what counts, in our view, is the function; whether Jay was legally entitled to hold the offices he occupied is immaterial.)

Id. at 310.

task for profit and potentially in competition with other firms." *Id.* at 2106, 2108.

Richardson does not preclude a court from basing an immunity decision primarily on "the nature of the function performed", especially when the actor, like Respondent Jay, is both a public official and an agent of the government involved in essential governmental activities. *See Clinton v. Jones, supra* at 1636. No clarification is needed from this or any other court on that point.

III.

NOT ONLY IS THERE NO CONFLICT AMONG THE CIRCUITS OVER THE ROLE A PUBLIC OFFICIAL MUST PLAY TO MERIT QUALIFIED IMMUNITY, BUT THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S QUALIFIED IMMUNITY ANALYSIS TO RESPONDENTS' CONDUCT.

Petitioners accurately state the legal principle defining the availability of qualified immunity to public officials. There is no question that, to merit qualified immunity, a government official must have been acting within his or her official capacity. There is no contest that a public official is not entitled to qualified immunity for acts taken outside the scope of his office, merely because he is a government employee. There is no conflict among the circuits on this issue. There is only a mischaracterization by the Petitioners of the Sixth Circuit's analysis of the roles and functions of the Respondents entitling them to qualified immunity.

Despite the gross disparity between both the kind of immunity in issue and the conduct for which the immunity was sought, Petitioners' citation to *Clinton v. Jones*, 520 U.S. ___, 137 L.Ed.2d 945, 117 S.Ct. 1636, to support

their argument that immunity is not available for "unofficial conduct," only underscores the correctness of the Sixth Circuit's decision. In *Clinton*, this Court was concerned with a request for a kind of immunity that not only does not exist[8] but was for "*unofficial* conduct." *Id.*, 137 L.Ed.2d at 960, 117 S.Ct. at 1643.

Petitioners do not really argue that Respondents' conduct was **not** official. Instead, they complain that "[t]he Court of Appeals never asked or even considered whether [the Respondents] were acting within the scope of their official duties or whether they were performing discretionary functions. . . . " Petition at 13. Their conclusion that the Sixth Circuit found Respondents "entitled to qualified immunity based purely on their identities as governmental employees" does not follow from this premise. Petition at 13.

Just as this Court in *Clinton* did not find it necessary to elaborate on why it believed that claims of sexual misconduct could not be construed as anything other than "*unofficial* conduct," neither did the Sixth Circuit in this case believe it had to explain why the alleged conduct of the Respondents was taken in an official capacity, given that it had described both their offices and their roles in the events about which Petitioners complained.

The Sixth Circuit commended the Petitioners for filing a sufficiently "fact-specific" complaint and affidavit so that the filings "present[ed] a reasonably clear picture of who the Defendants are and what they are supposed to have done." *Cullinan v. Abramson*, 128 F.3d at 310. The

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[8] In *Clinton*, the President sought a "temporary immunity from civil damages litigation arising out of events that occurred before he took office" for which there was no precedent. *Clinton*, 137 L.Ed.2d at 959, 117 S.Ct. at 1643.

Court of Appeals found that "the Plaintiffs' papers leave no room for doubt that Defendant Abramson was acting as the duly elected Mayor of the City of Louisville," that Respondent Jay "was acting as the City's director of finance and budget," and that Respondent "Unger was likewise acting as a City employee and *ex officio* member of the pension fund board." *Id.* From the Complaint, the Sixth Circuit discerned that Respondent Heavrin acted as the City's Law Director. *Id.* at 306. The Court then clearly identified the Respondent Law Firm and Lawyers as those retained by the City to represent it in its claims against the Petitioners. *Id.* at 310.

In particular, the Sixth Circuit described the role played by Respondent Nevin – the only party singled out by Petitioners as exemplifying the "legal significance" of the Sixth Circuit's "failure" to make the specific findings which it now asks this Court to make. In describing Mr. Nevin's "function," the Sixth Circuit stated that he was "a city employee who was a pension plan beneficiary, [who] had been asked [by the City] to bring the suit after the City's action had been dismissed for lack of standing; Nevin's counsel of record was defendant Christina Heavrin, the law director of the city." *Cullinan v. Abramson*, 128 F.3d at 306.

The Sixth Circuit did not err in concluding that the conduct for which Mr. Nevin was sued was taken in an official capacity. As the Sixth Circuit noted, Mr. Nevin was not originally the plaintiff in the City's lawsuit against trustees of the Retirement Fund and others, including Petitioner Cullinan – the City was. In that lawsuit the City had "alleged the existence of a scheme whereby improper fees and commissions were paid from the assets of the" Fund. *City of Louisville v. Stock Yards Bank & Trust Co.*, 843 S.W.2d at 328. The defendants,

however, persuaded the trial court to dismiss the City's action for lack of standing. The defendants had "concede[d] that fund beneficiaries," e.g., Nevin, would have had standing to bring the lawsuit, but the Kentucky Supreme Court noted that "these individuals would have little motivation to bring suit secure in the knowledge that their pension benefits are guaranteed by the taxpayers of the City of Louisville." *Id.* at 329. The Kentucky Supreme Court reversed the dismissal of the City's lawsuit with directions that it be reinstated but, in the meantime, the City had refiled it in Mr. Nevin's name who, the defendants had conceded, undoubtedly had standing as a beneficiary of the Retirement Fund.

Accordingly, the City was forced – by Petitioner Cullinan's erroneous opposition to the City's standing to pursue the original lawsuit – to file in Mr. Nevin's name a lawsuit that the Kentucky Supreme Court held was not only an appropriate suit for the City to bring but, in addition, that the City had the "duty, in the interest of sound public policy" to bring. *Id.* If the City had the duty to bring the lawsuit, as the Kentucky Supreme Court found it did, but could not bring it in its own name, then it had no choice but to bring it in the name of its agent and the agent in whose name it was filed was unquestionably acting within the scope of his official capacity in complying with his employer's directive to do so.

Clearly, Mr. Nevin did not decide to sue Mr. Cullinan as a lark. The Sixth Circuit's finding that Mr. Nevin is entitled to qualified immunity is consistent with its understanding of the context of Mr. Nevin's being directed to act as a plaintiff in the City's stead and wholly contradicts Petitioners' claims that the Sixth Circuit found that he was "entitled to qualified immunity based purely on [his] identity as [a] governmental employee."

Petition at 13. As noted above, the same is true for each of the Respondents.

Granting the petition for writ of certiorari would not serve any meaningful purpose as the Sixth Circuit has, in fact, conducted the analysis Petitioners claim that it did not conduct. That analysis consisted of more than determining that the Respondents were government employees. Accordingly, this issue does not involve a "conflict among the circuits as to whether a party's status as a government employee automatically entitles that party to qualified immunity," and raises no grounds for granting the Petition.

IV.

PETITIONERS MISCHARACTERIZE THE SIXTH CIRCUIT'S QUALIFIED IMMUNITY ANALYSIS WHICH, IN BOTH ITS STATEMENT OF THE RULE AND ITS APPLICATION TO THIS CASE, IS CONSISTENT WITH THIS COURT'S GUIDANCE AND IS NOT IN CONFLICT WITH EITHER THE PRINCIPLES OR APPLICATION OF QUALIFIED IMMUNITY ANALYSIS IN OTHER CIRCUITS.

Petitioners assert that there is a split among the circuits as to the level of factual specificity required to demonstrate that a right must be clearly established in order to defeat a public official's entitlement to qualified immunity and that the Sixth Circuit "improperly required a [sic.] 'extreme level of factual specificity,' . . . which conflicts with the legal norm standard applied by other circuits." Petition at pp. 15-16.

Petitioners' placement of the "test" of "extreme level of factual specificity" in quotations would lead a reader to deduce that those words are a direct quote from the Sixth Circuit's opinion and that such a test was in fact

applied by the Sixth Circuit in this case. Such a deduction would be in error. The quoted matter will not be found anywhere in the Sixth Circuit's opinion. Moreover, not only did the Sixth Circuit **not** apply such a test in this case, it has **never** applied such a test.

The test applied by the Sixth Circuit was that mandated by this Court in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), " 'that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Cullinan v. Abramson*, 128 F.3d at 310, *quoting Anderson v. Creighton*, 483 U.S. at 640. The Court of Appeals did observe that this test " 'clearly counsels the application of a fact-specific, as opposed to abstract, approach to qualified immunity questions.' " *Cullinan*, 128 F.3d at 310, *quoting Guercio v. Brody*, 911 F.2d 1179, 1184 (6th Cir. 1990), *cert. denied*, 500 U.S. 904 (1991). While it did not go into detail in this case, the Sixth Circuit has made it clear in other cases that the fact-specific "standard requires the courts to examine the asserted right at a relatively high level of specificity. . . . 'For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.' " *Cope v. Heltsley*, 128 F.3d 452, 458-59 (6th Cir. 1997), *quoting Saylor v. Bd. of Educ. of Harlan Cty., Ky*, 118 F.3d 507, 515 (6th Cir. 1997), *quoting Lassiter v. Alabama A&M Univ., Bd. of Trustees*, 28 F.3d 1146, 1150 (11th Cir. 1994).

The Sixth Circuit recognizes that " '[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.' " *McBride v. Village of Michiana*, 100 F.3d 457, 460 (6th Cir. 1996), *quoting Anderson*, 483 U.S. at 635. In fact, the Sixth Circuit has held, on more than one occasion, that "the lack of specific Supreme Court or Sixth Circuit precedent 'is not a sufficient condition for concluding that the law is unclear on the subject and so qualified immunity must be granted to the defendant.' " *McBride*, 100 F.3d at 460, *quoting McCloud v. Testa*, 97 F.3d 1536, 1556 (6th Cir. 1996).

As the Sixth Circuit recognized, " '[t]he easiest cases don't even arise. There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances.' " *Id.*, *quoting K. H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

In reaching for a cert worthy issue, it may be that Petitioners mistook the standard the Sixth Circuit had applied to the due process requirement of a "fair warning" prior to a criminal prosecution under 18 U.S.C. § 242. In this Court's opinion overruling that standard in *United States v. Lanier*, 520 U.S. ___, 137 L.Ed.2d 432, 117 S.Ct. 1219 (1997), it described "the extreme level of factual specificity envisioned by the Court of Appeals [as] necessary in every instance to give fair warning" "that criminal liability may be imposed under § 242," i.e., "only if the constitutional right said to have been violated is first identified in a decision of this Court (not any other federal, or state court), and only when the right has been held to apply in 'a factual situation fundamentally similar

to the one at bar.' " This Court noted that the Sixth Court "regarded these combined requirements as 'substantially higher than the 'clearly established' standard used to judge qualified immunity' in civil cases under" § 1983. *Id.*, 137 L.Ed. 2d at 440, *quoting United States v. Lanier*, 73 F.3d 1380, 1393 (6th Cir. 1996).

Thus, it was in the context of a § 242 prosecution that the Sixth Circuit applied the "extreme factual specificity" standard described by Petitioners – not to a qualified immunity analysis under § 1983. Most importantly, the Sixth Circuit recognized that test as more rigorous than that applied in qualified immunity cases. Clearly, it would not have applied that more rigorous standard to its qualified immunity analysis undertaken in this case.

Whether there is a split among the circuits as to the level of factual specificity which will be required before the law in a particular situation will be considered to be "clearly established" is irrelevant since the Sixth Circuit clearly follows the test espoused by Petitioners. Accordingly, it is clear that this is the wrong case in which to address these allegedly disparate views.

Nor was the Sixth Circuit's standard misapplied in this case. The Sixth Circuit simply was not presented with any precedent having **any** factual similarity to this case, much less at least "some . . . factual correspondence" such that the defendants would "know well developed legal principles and" be able "to relate and apply them to analogous factual situations." *Calhoun v. Gaines*, 982 F.2d 1470, 1475 (10th Cir. 1992) (cited by Petitioners as reflecting "the less stringent 'legal norm' requirement applied in other circuits. . . . ").

In assessing Petitioners' claims, the Sixth Circuit read the complaint as asserting a "constitutional right not to be included as a defendant in the city's suit against the

elected pension fund trustees" and from certain trustees' "trying to persuade their fellow trustees to fire a money manager whose covered call writing strategy was considered, rightly or wrongly, to be ill-advised." *Cullinan*, 128 F.3d at 312. According to Petitioners, this description "miscast" their complaint, but would have been accurate had it stated, instead, that Petitioners were asserting a "constitutional right not to be **retaliated against** by being named in the city's **groundless** suit against the elected pension fund trustees" and from certain trustees' "trying **by threats and intimidation** to persuade their fellow trustees to fire a money manager whose covered call writing strategy was considered, rightly or wrongly, to be ill-advised." Petition at 18.

Even as recast by Petitioners, it is apparent that the Sixth Circuit could not have erred in failing to discern any factual correspondence between their complaint and the cases relied upon by the Petitioners as "clearly establishing" the "constitutional rights" alleged. Interestingly, while Petitioners relied below on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), as establishing a clear right to be free from retaliatory action for exercising their First Amendment right to speak out on matters of public concern, they do not mention the case anywhere in their Petition, apparently conceding that the facts of that case are too far removed from their claims even to be counted as "analogous." In fact, Petitioners posit in their Petition **no** precedent establishing that principle and putting Respondents on notice that including them as defendants in the city's "groundless" suit in "retaliation" for their speech would violate their Constitutional rights.

Instead, Petitioners now rely **solely** on *Greene v. McElroy*, 360 U.S. 474, 492, 508 (1959), as establishing their Constitutional rights under factual circumstances

sufficiently close to this case. In *Greene*, this Court held that the Department of Defense could not deprive a government employee of his security clearance, and therefore his job, through "a proceeding in which [the employee] was not afforded the safeguards of confrontation and cross-examination," i.e., without procedural due process, because that would violate the Constitutional right "to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference. . . . " *Id.*

The Sixth Circuit was not satisfied that there was sufficient factual congruence between a Defense Department employee deprived of a security clearance without a proper hearing and a money manager for a pension fund being sued for losses resulting from making poor investment decisions. Respondents would submit that even a very liberal rendering of the clearly established law standard could reach no other conclusion.

Given that Petitioners posit **no** precedent of even vaguely comparable factual correspondence, it is irrelevant that there could be a split among the circuits over the minimum level of factual specificity required for the "clearly established law" analysis. Moreover, as is apparent from the standard actually applied by the Sixth Circuit, that court does not apply "too rigorous" a test and, therefore, this is not a case which would be useful for setting a more precise standard, even if the Court wished to do so.

V.

NO CONFLICT EXISTS AMONG THE CIRCUITS OVER THE AVAILABILITY OF QUALIFIED IMMUNITY TO RICO CLAIMS AND THE COURT OF APPEALS CORRECTLY APPLIED THE QUALIFIED IMMUNITY ANALYSIS TO PLAINTIFFS' RICO CLAIMS.

Respondents had sought both absolute and qualified immunity from the Petitioners' RICO claims. The Sixth Circuit addressed the absolute immunity issue at length, but ultimately passed on the question because of its conclusion that Respondents were entitled to qualified immunity from all Petitioners' claims. *Cullinan v. Abramson*, 128 F.3d at 309. Before doing so, however, the court said that it had "been given no reason to suppose that RICO was intended to abolish" absolute immunity and observed that "[I]t would be anomalous . . . if officials who are immune from suit for alleged violations of the Constitution itself should be denied immunity from suit for alleged violations of a statute that does not incorporate the Constitution – particularly a statute as amorphous as RICO." *Id.* at 308, *citing Linne v. Rideoutte*, 971 F.2d 766 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993) ("where the enactment of RICO was held not to have abrogated the immunities by which government officials and witnesses are protected from civil damage claims.").

Noting that there is "no Supreme Court or Sixth Circuit precedent that could properly be said to have informed the defendants that they could not do what they stand accused of doing without violating 'clearly established' rights conferred on the plaintiffs by the RICO statute," the Sixth Circuit applied the same qualified immunity analysis to the RICO claims as it did to the Petitioners' § 1983 claims. *Id.* at 317.

Petitioners petition for review of this decision because of the "need" for "clarity" as to "whether RICO claims can be subject to qualified immunity defenses." Petition at 21. Petitioners are particularly concerned "that individuals who engage in criminal conduct are entitled to qualified immunity." Petition at 21. Given the large number of cases in which courts have allowed immunities to be asserted to RICO claims, a conflict among the circuits on this question cannot really be said to exist. Additionally, this Court's recent application of the qualified immunity analysis to criminal prosecutions of public officials indicates that the clarification sought by Petitioners has already been provided.

A. All cases in which courts have addressed the issue have held that immunity defenses *are* available to RICO claims.

Petitioners imply that the issue of qualified immunity to RICO claims has arisen in only three cases in two circuits with indeterminate results. In fact, many courts in many cases have directly addressed the availability of immunity defenses to RICO claims, universally finding them applicable. Absolute immunity has been applied to RICO claims brought against public officials in the position of judges, legislators, and prosecutors. *Thillens, Inc. v. Community Currency Exchange Assoc.*, 729 F.2d 1128, 1130 (7th Cir. 1984); *Chappell v. Robbins*, 73 F.3d 918, 922 (9th Cir. 1996); *Ehrlich v. Giuliani*, 910 F.2d 1220, 1223-24 (4th Cir. 1990); and *White v. Howard*, 9 F.3d 111, 1993 WL 424972 (6th Cir. 1993) (unpublished disposition reproduced in Appendix).

Additionally, qualified immunity has routinely been allowed as a defense to RICO claims. For example, in *Hancock v. Vongarlem*, 1989 WL 11710 (D.D.C. 1989)

(unpublished opinion reproduced in Appendix at 41), the D.C. District Court noted that

> even if the plaintiffs had alleged a cause of action, their claim flounders on defendants' qualified immunity defense. For, even if the defendants' conduct with respect to the contracts were actionable, recognition of a federal civil claim of extortion would be a new development in the law not now 'clearly established.' . . . Nor has it been 'clearly established' that a RICO claim will lie against federal officers or a group of federal officers on account of their official misconduct.

Citing Burke v. FBI, Civil No. C-84-2078 (N.D. Ohio, June 5, 1985), *aff'd without opinion*, 798 F.2d 1413 (6th Cir. 1986). The D.C. Court recognized *Burke* as "authority, albeit in another context, that such an action would not lie," and found significant that, "[b]y contrast, plaintiffs cite no case establishing RICO liability of a federal officer or group of federal officers on account of misconduct of their official duties." *Id.*

Similarly, in *Lightner v. Tremont Auto Auction, Inc.*, 564 F.Supp. 1112, 1120 (N.D. Ill. 1983) (emphasis added), the Illinois District Court found that "the federal defendant's qualified immunity defense [would] not presently serve as a bar to the civil rights claim under § 1983 in Count IV **or the RICO claim** of Count VII." That court reasoned that the federal defendants had not yet shown "that they should not reasonably have expected that their investigation would violate these statutes," implying that the RICO count would be subject to dismissal because of the defendants' qualified immunity if they should demonstrate that element of the immunity defense.

Finally, while finding that the plaintiffs' allegations "that all the federal defendants were involved in some

type of RICO conspiracy falsely to indict and convict and incarcerate" did "not rise to the level of specificity required in a damages action against a federal official," the D.C. District Court in *Lojo v. Paulos*, 1995 WL 663259 (D.D.C. 1995) (unpublished opinion reproduced in Appendix at 45), "note[d] that it appears that the federal defendants are entitled to absolute or qualified immunity" and "[t]he motion to dismiss of the federal defendants must be granted."

As they did below, Petitioners continue to cite cases that they believe support their position that immunity defenses are not available to RICO claims. Petition at 20. These cases do not, however, even break the surface of the issue. In *Rose v. Bartle*, 971 F.2d 331 (3rd Cir. 1989), for example, no immunity defenses were asserted to the RICO claims. An argument similar to Petitioners' made in *Chappell* merited that court's admonition that it did "not consider it even persuasive authority, however, because the issue of immunity was never raised." *Chappell*, 73 F.3d at 925 n.3, *citing SEIU v. County of San Diego*, 35 F.3d 483, 489 (9th Cir. 1994) (rejecting as authority prior cases which reached contrary result without addressing dispositive underlying issue).

In fact, given the unanimity of federal courts on this issue, a case cannot be made for a split among the circuits on the availability of immunity defenses to RICO claims. The Court should deny the Petition.

B. The grant of qualified immunity to the RICO claims does not raise an important question of law that either has not been or should be settled by this Court.

Petitioners complain that the Sixth Circuit erred in applying "[t]he 'clearly established' *Harlow* test" to RICO

claims, because "RICO violations involve claims of criminal wrongdoing and unlawful acts. By definition, RICO claims involve allegations of intentional misconduct" and "the common law upon which § 1983 qualified immunity is based did not grant immunity for intentional misconduct." Petition at 20.

Petitioners' argument is undermined by a short review of some of the more important qualified immunity cases in which qualified immunity was applied to intended, willful action rather than negligent conduct. *See, e.g., Anderson v. Creighton,* 483 U.S. 635 (1987) (qualified immunity for warrantless search); *Mitchell v. Forsyth,* 472 U.S. 511 (1985) (qualified immunity for wiretapping telephone); *Poe v. Haydon,* 853 F.2d 418 (6th Cir. 1988) (qualified immunity for sexual harassment).

Moreover, in enacting the RICO legislation, Congress did not expressly preclude the application of immunity as it must do to abrogate that defense. This Court has "accorded certain government officials either absolute or qualified immunity from suit if the 'tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' " *Wyatt v. Cole,* 504 U.S. 158, 163-64 (1992), *quoting Owen v. City of Independence,* 445 U.S. 622, 637, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980). While often referred to as "1983 immunities" because they are most often asserted in defense of Section 1983 cases, the immunities are available to any public official defendant in any case in which they would have been available at common law and have not been abrogated by Congress. For example, in finding the immunities available to Section 1983

public official defendants, this Court "determin[ed] whether there was an immunity at common law that Congress intended to incorporate in" 42 U.S.C. Section 1983 by looking "to the most closely analogous torts – in this case, malicious prosecution and abuse of process." *Id.* Thus, in *Wyatt*, this Court applied immunity defenses in the context of a defense to the *same intentional* tort as Petitioners level against these Respondents.

Petitioners argue that criminal conduct is qualitatively different than tortious conduct – even intentional torts – and, therefore, the availability of such immunity defenses at common law for tortious conduct does not apply to criminal conduct. The connection decried by Petitioners was, however, very recently made by this Court in *United States v. Lanier*, 520 U.S. ___, 137 L.Ed.2d 432, 117 S.Ct. 1219. In *Lanier* a state court judge was indicted under 18 U.S.C. § 242 for sexually assaulting women in his judicial chambers. The defendant asserted due process protections which required that he have "fair warning" that he was violating that statute, which makes it a criminal offense to act willfully and under color of law to deprive a person of rights protected by the Constitution or laws of the United States. *Id.*, 137 L.Ed.2d at 442. This Court held that the "fair warning" analysis for purposes of that defense to a criminal indictment was the same as the "clearly established" analysis employed in analyzing an immunity defense to civil liability for a constitutional violation under § 1983.

> In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants 'reasonably can anticipate when their conduct may give rise to liability,' . . . by attaching liability only if '[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing

> violates that right,' . . . So conceived, the object of the 'clearly established immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying § 242. **The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.**

Id., 137 L.Ed.2d at 445 (emphasis added).

Contrary to the arguments made by Petitioners, public officials facing criminal prosecution for violating constitutional or other statutory rights have long enjoyed immunity from prosecution analogous to public officials charged civilly with such violations. Had Respondents been subjected to criminal prosecution for the alleged RICO violations, they would have been entitled to "fair warning" of the scope of their criminal liability. They are equally entitled to civil immunity unless their allegedly "criminal conduct" has been "clearly established" under the existing law. Accordingly, the Sixth Circuit correctly applied the qualified immunity analysis to the RICO claims and there is no basis for granting the Petition.

CONCLUSION

Petitioners have not raised any issues meriting this Court's review on Petition for Writ of Certiorari. The Petition should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

R. KEITH CULLINAN

and

CULLINAN ASSOCIATES, INC.
22nd Floor, One Corporate Plaza
220 West Main Street
Louisville, KY 40202

Plaintiffs

vs.

JERRY E. ABRAMSON, MAYOR
City of Louisville
City Hall
Louisville, KY 40202

and

CITY OF LOUISVILLE

SERVE: Jerry E. Abramson, Mayor
City Hall
Louisville, KY 40202

and

STUART P. JAY
416 Mockingbird Hill Road
Louisville, KY 40207-1321

and

EARL MAC UNGER, Executive Administrator
Finance and Budget Department
City of Louisville
City Hall
Louisville, KY 40202

COMPLAINT

CASE NO. C'94 0198 L-S

(Filed Mar. 21, 1994)

and

CHRISTINA HEAVRIN
Director of Law
City of Louisville
City Hall
Louisville, KY 40202

and

JOHN H. NEVIN
4508 Dearing Avenue
Louisville, KY 40213

and

WILLIAM C. BOONE
The Levy Building
Third Floor
133 South Third Street
Louisville, KY 40202-1333

and

SAMUEL D. HINKLE IV
2650 Capital Holding Center
400 W. Market St.
Louisville, KY 40202-3377

and

CULVER V. HALLIDAY
2650 Capital Holding Center
400 W. Market St.
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and

GREENEBAUM, TREITZ,
BROWN & MARSHALL,
formerly a Kentucky
General Partnership

SERVE: John S. Greenebaum)
2700 First National Tower)
Louisville, KY 40202)
)
Defendants)

JURISDICTION

1. This is an action for relief under the provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq ("RICO") and for relief under the provisions of the Civil Rights Act, 42 U.S.C. §1983 et seq. There are pendent state claims.

2. This Court has jurisdiction of this action under 18 U.S.C. §1964(c), 28 U.S.C. §1343(a)(1), 28 U.S.C. §1343(a)(3) and 28 U.S.C. §1343(a)(4), and supplemental jurisdiction of all pendent state law claims under 28 U.S.C. §1367.

PARTIES

3. Plaintiff R. Keith Cullinan ("Cullinan") is and at all times material to this action has been a United States citizen and a resident of Jefferson County, Kentucky. Cullinan was an employee of Stock Yards Bank & Trust Company at all times alleged herein through January, 1990, subsequent to which he was an employee of Plaintiff Cullinan Associates, Inc.

4. Plaintiff Cullinan Associates, Inc. ("Cullinan Associates") is and at all times material to this action has been a corporation incorporated under the laws of Kentucky and transacting business in Jefferson County, Kentucky.

5. Defendant Jerry E. Abramson ("Abramson") is and at all times material to this action has been a United States citizen and a resident of the Commonwealth of Kentucky.

6. Defendant City of Louisville ("City") is a municipal corporation and constitutes a city of the first class as outlined in the governmental organizational scheme of the statutes of Kentucky.

7. Defendant Stuart P. Jay ("Jay") is and at all times material to this action has been a United States citizen and a resident of the Commonwealth of Kentucky. Defendant Jay was appointed by Defendant Abramson as the City's Director of Finance and Budget, a position that he was not legally entitled to hold given his lack of residence in the City of Louisville.

8. Defendant Earl Mac Unger ("Unger") is and at all times material to this action has been a United States citizen and a resident of the Commonwealth of Kentucky. At all times alleged herein he was an employee of the City of Louisville.

9. Defendant Christina Heavrin ("Heavrin") is and at all times material to this action has been a United States citizen, and a resident of the Commonwealth of Kentucky. At certain times alleged herein she was an employee of the City of Louisville.

10. Defendant John H. Nevin ("Nevin") is and at all times material to this action has been a United States citizen, and a resident of the Commonwealth of Kentucky. At all times alleged as to him, Nevin was an employee of

the City of Louisville and was a retired City police officer and a beneficiary of the Fund as hereinafter described.

11. Defendant William C. Boone ("Boone") is and at all times material to this action has been a United States citizen and a resident of the Commonwealth of Kentucky. At certain times alleged herein, Defendant Boone was also a partner in the law firm of Greenebaum, Treitz, Brown & Marshall.

12. Defendant Samuel V. Hinkle, IV ("Hinkle") is and at all times material to this action has been a United States citizen and a resident of the Commonwealth of Kentucky. At all times alleged herein, Defendant Hinkle was a partner in the law firm of Greenebaum Treitz Brown & Marshall.

13. Defendant Culver V. Halliday ("Halliday") is and at all times material to this action has been a United States citizen and a resident of the Commonwealth of Kentucky. At all times alleged herein, Defendant Halliday was employed by the law firm of Greenebaum Treitz Brown & Marshall.

14. Defendant Greenebaum Treitz Brown & Marshall ("GTBM") was at all times material to this action a Kentucky general partnership engaged in the practice of law. GTBM was the successor in interest to Greenebaum Boone Treitz Maggiolo & Brown. Plaintiffs state upon information and belief that GTBM ceased doing business as a partnership on December 31, 1993. Plaintiffs state upon information and belief that its managing partner was John S. Greenebaum, who is served in that capacity and as representative of the other partners in GTBM and any predecessor partnership. Plaintiffs state that all of the

actions complained of herein taken by Defendants Boone, Hinkle and Halliday were taken within the course and scope of their employment and/or partnership at GTBM and hence GTBM and its individual partners are vicariously liable for such actions.

FACTS COMMON TO ALL COUNTS

15. In November, 1985, Defendant Abramson was elected Mayor of the City of Louisville. He assumed office in January, 1986.

16. Prior to 1986 and for over twenty years, the active police officers employed by the City of Louisville, and the retired police officers formerly employed by the City of Louisville, contributed to, and accrued rights under, a Pension Fund (hereinafter the "Fund") established by the City of Louisville pursuant to the authority of then KRS 95.290 and Louisville General Codified Ordinances ("LCO"), §36.100 et seq.

17. As of May 1, 1986, the Fund had assets totaling $83.8 million in market value, and provided benefits for, or had members totalling, four hundred and seventy-two (472) retired officers and their beneficiaries and six hundred and forty-five (645) active officers.

18. Prior to 1984, police officers employed by the City were entitled to eighteen (18) sick days per year. Unused sick days could be accrued from year to year. The ability to accrue sick days ended in 1984, at which time the total of accrued sick leave equaled almost one hundred thousand (100,000) days.

19. The City faced the potential of being required to "repurchase" these unused sick leave days based upon their salary value, which was calculated by the City in 1984 to be $7,290,085.

20. Plaintiffs state upon information and belief that some or all of the Defendants, and most particularly Defendant Abramson, regarded the Fund as what is commonly referred to as an "overfunded" plan. Defendant Abramson determined to accomplish the transfer of the active police officers from the Fund to the County Employee Retirement System ("CERS") in order to avail the City of some or all of the monies in the Fund purportedly in excess of the monies required to actuarially cover Fund obligations and, simultaneously, to use monies not belonging to the City, but rather to the Fund itself, to discharge the City's current and future obligations.

21. Some of the Defendants, specifically including the City and Defendant Abramson, began to negotiate in early 1986 with the Fraternal Order of Police, Louisville Lodge No. 6 ("FOP"), the bargaining representative for the active police officers, for the division between the City and the FOP of monies belonging to the Fund, and not to either group. The FOP and the City ultimately agreed that the purported "excess" funds in the Fund would be allocated fifty-five percent (55%) to the FOP (presumably for the active duty officers), fifteen percent (15%) to the Fund and thirty percent (30%) to the City, and that each active police officer would receive Twenty Three Dollars and Four Cents ($23.04) for each accumulated sick day, for a total of approximately $2 Million.

22. Absent revision of the applicable statutes, the agreement reached by the City and the FOP would have been in violation of Kentucky Statutes and Louisville Ordinances. Plaintiffs state upon information and belief that Defendants or persons acting on their behalf had legislation introduced in the 1986 Kentucky General Assembly on February 24, 1986, and enacted on April 4, 1986, with an emergency clause requiring an immediate effective date. That legislation accomplished amendments to KRS 95.290 specifically requiring all police officers employed by the City in the future to participate in CERS, allowing active police officers to opt into CERS, and permitting the use of any so-called "excess funds" following entry of police officers into CERS "for use by the City for any other purpose it may elect . . . ," KRS 95.290(3)(d).

23. The City had been advised by an Attorney General's Opinion dated October 22, 1984, that a change in a City ordinance was all that was required to transfer active officers to CERS. However, absent amendment to KRS 95.290, the City could not have obtained Fund monies for its own uses.

24. On July 15, 1986, the City calculated that $3,955,540 of monies in the Fund were "excess" funds due to the transfer of the active police officers to CERS. These monies were disbursed from the Fund in accordance with the agreement between the City and the FOP, as referenced in Paragraph 21, above.

25. From 1986 to date, Plaintiff Cullinan voiced his opposition repeatedly to the City's taking of the so-called "excess funds" at meetings of the Fund and in informal

conversations with Trustees and other Fund representatives. Plaintiff Cullinan repeatedly urged the Fund to contest these actions by the City.

26. In 1986, Defendant Abramson had appointed Defendant Jay as the City Director of Finance and Budget. At the inception of his appointment and at all times subsequent thereto, Defendant Jay did not meet the requirements specified by statute for the City's Director of Finance and Budget in that he was not a resident of the City of Louisville. As such, all actions taken by Defendant Jay in his position as the City's Director of Finance and Budget were at all times *ultra vires* and unauthorized.

27. Plaintiff Cullinan, by virtue of his position as an employee with Stock Yards Bank & Trust Company, was in charge of investment management for a substantial portion of the Fund's assets since 1977. The investment strategy utilized by Plaintiff was known as covered option writing on high quality common stocks. Defendant Jay had been a long-time opponent of this investment strategy and had, in fact, disputed publicly the efficacy of this investment strategy.

28. Defendant Jay, by virtue of his appointment (albeit illegal) as the City Director of Finance and Budget, was an ex-officio member of the Fund's Board of Trustees. From the inception of his service on the Board of the Fund, Defendant Jay disagreed with the investment philosophy utilized by the Trustees and the selection by the Trustees of money managers for the Fund's assets. From the inception of his service on the Board of the Fund, Defendant Jay attempted to have Plaintiff Cullinan fired as one of the Fund's money managers.

29. In 1986, after and as a result of the split-up of the Fund incident to the transfer to CERS by the active police officers, the Fund Trustees sought an updated asset allocation study from its independent consultant of long standing, Callan Associates ("Callan"). After careful study, Callan recommended to the Trustees that the Fund's asset allocation, including that portion of the assets managed by Plaintiff Cullinan, not be changed materially. Defendant Jay disagreed with and refused to accept this recommendation.

30. On or about September 1, 1986, three new members were elected to the Fund's Board of Trustees. One of these members was an active duty police officer and two were retirees. They joined the two incumbent elected Trustees who were active duty police officers. The active duty police officers were employees of the Defendant City. Defendants Jay and Unger and other persons acting on behalf of the City attempted to coerce the elected Trustees to hire and fire stock brokers and money managers for the Fund as determined by the City, and specifically to fire Plaintiff Cullinan. When the Trustees would not acquiesce to the demands of the Defendants, Defendant City passed another ordinance in mid-1987 effectively firing the elected Trustees and requiring election of new Trustees.

31. On September 1, 1987, five persons were elected as new Trustees for the Fund, all of whom were retired police officers. Defendant City had supported certain candidates, including Defendant Nevin, who were not elected. Defendants Jay and Unger continued their efforts to influence these newly elected Trustees in the hiring and firing of brokers and money managers and with

regard to investment policies of the Fund. Specifically, these Defendants urged the Trustees to fire Plaintiff Cullinan.

32. Throughout their tenures as ex-officio Trustees, Defendant Jay and Defendant Unger claimed that brokerage commissions paid incident to Fund transactions were excessive, particularly as to assets managed by Plaintiff Cullinan. As a consequence, the Fund appointed a special committee chaired by the citizen appointee on the Fund's board to examine this issue. The Committee determined that brokerage commissions paid by the Fund were competitive and in many cases lower than those paid by similar funds. Although Defendant Jay seconded and voted for the motion to accept the Committee's findings, he nevertheless continued to charge that Plaintiff Cullinan permitted excessive commissions on Fund transactions.

33. In March, 1988, and due to Defendant Jay's and Defendant Unger's constant questioning of the Fund's investment performance, the Fund obtained a study from E.F. Hutton (now Smith Barney Shearson) that showed that the Fund assets managed by Stock Yards Bank and Trust Company under the direction of Plaintiff Cullinan had generated a net time-weighted rate of return of 14.75% per year for the preceding 10 years. Defendant Jay insisted on obtaining at City's expense a separate study by Merrill Lynch. The results of this study reflected an even better rate of return of 15.01% per year for the preceding 10 years.

34. Plaintiff Cullinan states on information and belief that the urging by Defendants Jay and Unger that

the Trustees fire Plaintiff Cullinan was for the purposes of silencing Plaintiff Cullinan's objections to the City's taking of the excess funds, of replacing Plaintiff Cullinan with a money manager selected by said Defendants who would be a friend and/or political associate of said Defendants and/or Defendant Abramson, of ensuring that the investment strategies of Defendant Jay would thereafter be followed by the Fund, and for the purpose of punishing Plaintiff Cullinan for his opposition to the desires of Defendants Abramson, Jay and Unger.

35. The Fund attempted to negotiate with the City for a resolution of the issue of the claimed "excess funds." This effort was unsuccessful. The beneficiaries of the Fund voted nearly unanimously to pursue a civil claim against the City for return of the so-called "excess funds." At the direction of the Fund, the attorney for the Fund filed suit against the City of Louisville on October 25, 1989, Civil Action No. 89CI-08065, Jefferson Circuit Court, Division 8, styled *Policemen's Retirement Fund of The City of Louisville, et al v. City of Louisville* (hereinafter "Suit No. 1"), alleging in general that the City illegally removed monies from the Fund and that the amendments to KRS 95.290 allowing use of Fund monies "for any purpose" were unconstitutional. That action also sought the return of $3,422,518 (plus interest and costs) from the City of Louisville.

36. On December 11, 1989, Defendant Abramson hired, without competitive bidding, Defendant Boone and the partnership then known as Greenebaum, Boone, Treitz, Maggiolo & Brown, and later known as GTBM, to

defend the City in Suit No. 1. Plaintiffs state on information and belief that Defendant Boone was initially responsible for supervision of the litigation, that Defendant Hinkle was later responsible for supervision of the litigation, and that Defendant Halliday worked on the litigation.

37. Without notice to the Fund, Suit No. 1 was dismissed on motion of the City by Order entered February 9, 1990. Despite this dismissal, of which Defendant Halliday received notice within several days, Defendant Halliday misrepresented to counsel for the Fund and to the Court the status of the litigation by not disclosing the dismissal of which he had knowledge until the appeal time had expired and by affirmatively taking steps which would lead counsel for the Fund to believe that the litigation was still pending and active. When counsel for the Fund ultimately discovered the dismissal of the suit, and sought by appropriate motion to reinstate the suit, Defendant Halliday and Defendant GTBM objected to and opposed those efforts. Despite those objections, the suit was reinstated.

38. Defendant Unger attended several meetings of the Fund at which Suit No. 1 was discussed, but he never reported that the suit had been dismissed.

39. On April 13, 1990, Defendant Boone advised counsel for the Fund that a retaliatory action would be filed against the five elected Trustees of the Fund personally and against Plaintiffs and others unless the Board agreed to meet certain conditions, which included, *inter alia*, that the Fund discharge Plaintiffs and certain of the Fund's stock brokers and not do business with them for

twenty (20) years, that Suit No. 1 be dismissed (which would result in the City's retention of the "excess" funds in toto), that the Fund acquiesce in the City's mandates regarding certain of the Fund's investment policies, that Defendant Abramson appoint all future Trustees, that the Fund Administrator resign, and that Defendant City through Defendant Jay be granted the right to approve all future bonuses to beneficiaries (despite a City ordinance requiring bonuses to be paid). Attached hereto as Exhibit 1 are the specific terms of the demand by Defendant Boone. Defendant Hinkle participated in these demands. Defendant Boone presented counsel for the Fund with a prepared Complaint, identical in all particulars to the Complaint which was filed as "Suit No. 2" immediately after the Trustees refused to acquiesce to this threat.

40. The demands by Defendant Boone, if met by the Trustees, would have required the Trustees to violate state statutes which vested the "exclusive authority relating to investments" of the Fund with the Trustees, not the City. K.R.S. 95.290(2).

41. On or about April 17, 1990, Defendant Boone or Defendant Hinkle offered to "split" with the Fund any recovery that might be made in what was to be "Suit No. 2."

42. Plaintiffs state on information and belief that the demands of Defendant Boone referred to in Paragraph 39, above, were made with the full authority of Defendants Abramson and Jay.

43. By those actions, Defendant Boone and Defendant Hinkle offered to confer a pecuniary benefit upon public servants by relieving them of the personal expense

of defending against and/or paying personally under the threatened lawsuit with the intent to influence the actions of the public servants as Trustees of the Fund.

44. Defendant Boone and/or Defendant Hinkle offered to confer a pecuniary benefit upon public servants by sharing with them, as beneficiaries of the Fund, any monies that might be recovered in what was to be Suit No. 2 with the intent to influence the actions of the public servants as Trustees of the Fund.

45. Defendant Hinkle, and Defendants Abramson, Jay, Unger and Heavrin acting through other persons, continued the threats and demands of Defendant Boone in subsequent meetings regarding Suit No. 1, specifically in December, 1992, or January, 1993, and August or September, 1993. By these actions, Defendants have offered to confer a pecuniary benefit upon public servants by relieving them of the personal expense of defending against and/or paying personally under Suit Nos. 2 and 3 with the intent to influence the actions of the public servants as Trustees of the Fund.

46. By these actions, Defendants Boone and Hinkle have violated K.R.S. 521.020, "Bribery of a Public Servant" which is punishable by imprisonment for more than one year and is a predicate act under 18 U.S.C. §1961.

47. By these actions, Defendants Boone and Hinkle have violated K.R.S. 518.020, "Commercial Bribery."

48. Defendants Boone, Hinkle, Abramson, Jay, Unger and Heavrin have conspired to violate KRS 521.020

and KRS 418.020 in violation of KRS 506.040, "Criminal Conspiracy."

49. Defendants Boone and Hinkle intentionally attempted to obtain the property of the beneficiaries of the Fund and of the elected Trustees, who were also beneficiaries, by threatening to accuse the elected Trustees of a criminal offense or to adversely affect them by the personal expense of defending against and/or paying personally under the threatened lawsuit, which would be filed as a wrongful use of their position as public officers, servants or employees.

50. By these actions, Defendants Boone and Hinkle have attempted to violate KRS 514.080, "Theft by Extortion," which attempt is a violation of KRS 506.010, "Criminal Attempt."

51. Defendants Boone, Hinkle, Jay and Abramson have conspired to attempt to violate KRS 514.080 in violation of KRS 506.040, "Criminal Conspiracy."

52. On April 19, 1990, the City filed an action, referred to herein as "Suit No. 2" and styled No. 90CI-03253, Jefferson Circuit Court, Division Eight, *City of Louisville v. Stock Yards Bank & Trust Co., et al*, against the five elected Trustees of the Fund personally, Plaintiff Cullinan, Plaintiff Cullinan Associates, Inc. and other defendants. Suit No. 2 alleged, *inter alia*, that Plaintiff Cullinan and Plaintiff Cullinan Associates had committed fraud, had mismanaged and conspired to mismanage Fund assets, had improperly diverted assets and had engaged in deceitful, fraudulent and illegal transactions concerning the monies in the Fund.

53. The filing of Suit No. 2 and the allegations made therein against Plaintiffs received widespread publicity, including prominent front page coverage in the Courier-Journal.

54. The allegations made in Suit No. 2 against Plaintiffs were false, misleading and not supported by any evidence.

55. On April 10, 1991, the Court dismissed Suit No. 2 on the ground that the City lacked standing.

56. Following dismissal of Suit No. 2, Defendant Jay approached Defendant Nevin and solicited Defendant Nevin's cooperation and assistance by serving as a plaintiff in a suit which would be identical in all respects to Suit No. 2. Nevin was then, and still is, a city employee in the capacity of Director of the Disaster and Emergency Services Department.

57. Prior to filing suit, Nevin sought and received what was purported to be an indemnification agreement from the City. On June 13, 1991, Defendants GTBM filed on behalf of Defendant Nevin a civil action styled No. 91CI-03889, Jefferson Circuit Court, Fifteenth Division, *John H. Nevin v. Stock Yards Bank & Trust Co., et al,* ("Suit No. 3") which was identical in all particulars to Suit No. 2.

58. Defendant Nevin had no personal knowledge of the allegations contained in Suit No. 3 and all of his information regarding the allegations in that suit were obtained from Defendant Jay, Defendant Unger and/or Defendants Hinkle and Halliday.

59. Defendant Nevin made no independent investigation of the truth or falsity of the allegations contained in Suit No. 3.

60. The filing of Suit No. 3 and the allegations made therein against Plaintiffs received widespread publicity, including prominent coverage in the Courier-Journal.

61. The allegation made in Suit No. 3 against Plaintiffs were false, misleading and not supported by any evidence.

62. Although Nevin's claims in Suit No. 3 are those of a private citizen and a Fund beneficiary, the City has undertaken to pay his legal fees and expenses, and the Law Director of the City of Louisville, Defendant Heavrin, is of record as Nevin's counsel and has provided services to Nevin as his personal attorney in Suit No. 3.

63. Defendant Nevin would not have appeared as plaintiff in Suit No. 3 absent the agreement of the City, as expressed by Defendant Heavrin, to provide indemnification to Defendant Nevin and to pay Defendant Nevin's legal fees and costs.

64. Suit No. 2 was reinstated by Order of the Kentucky Supreme Court on December 17, 1992.

65. Defendant City, acting by and through Defendant Heavrin, has refused to honor its legal obligation to provide counsel and/or indemnification to the five elected Trustees of the Fund in their defense of Suit Nos. 2 and 3.

66. The refusal to indemnify these five elected Trustees has been in bad faith and for the purpose of coercing a resolution of Suit No. 1 in the City's favor.

67. Defendants Abramson and Jay, and perhaps other employees or associates of the City acting at their direction, have repeatedly insisted and conspired to attempt to force the elected Trustees to terminate the business relationship between the Fund and Plaintiffs. The business relationship between the Fund and Plaintiffs constituted a valuable property right as did the right to transact business with whomever they chose and the right to make business decisions free of outside pressures, all of which said Defendants sought to obtain under the wrongful use of fear and coercion.

68. Defendant Boone and Defendant Hinkle, by the actions complained of in Paragraph 39, above, attempted to obtain the valuable property rights of the Trustees of the Fund to solicit and transact business with whomever they chose, of the elected Trustees to serve on the Board, to make business decisions free of outside pressures, and of the beneficiaries of Fund to seek the return of monies rightfully theirs.

69. Defendants Hinkle, Abramson, Jay, Unger, Heavrin and Halliday, have continued, attempted to continue or conspired to continue the threats and demands of Defendant Boone in subsequent meetings regarding Suit No. 1, specifically in December, 1992, or January, 1993, and August or September, 1993. They have attempted to obtain, or conspired to obtain, the valuable property rights of the Trustees of the Fund to solicit and transact business with whomever they chose, of the elected Trustees to serve on the Board, to make business decisions free of outside pressures, and of the beneficiaries of Pension Fund to the return of monies rightfully theirs.

70. Defendant Jay has wrongfully refused to turn over to the Fund monies duly appropriated for it by the Board of Aldermen of the City of Louisville for fiscal year 1991-1992 pursuant to ordinance. This has been done for the purpose of coercing the Trustees to acquiesce in the demands of Defendant Jay and Unger and to increase the economic pressure on the Fund, and on the beneficiaries, for the purpose of forcing the Trustees to consent to the resolution of Suit No. 1. desired by the City, and in an attempt to convince the beneficiaries to remove the elected Trustees.

71. Defendant City has, at times, blocked the payment of bonuses required by law to be paid to the beneficiaries for the purpose of coercing the Trustees to acquiesce in the demands of Defendant Jay and Unger and to increase the economic pressure on the Fund and on the beneficiaries for the purpose of forcing the Trustees to consent to the resolution of Suit No. 1. desired by the City, and in an attempt to convince the beneficiaries to remove the elected Trustees.

72. The actions of Defendants City, Boone, Hinkle, Abramson, Jay, Unger, Heavrin and Halliday, complained of in Paragraphs 67 through 71, above, affected commerce.

73. Defendants Boone, Hinkle, Abramson, Jay, Unger, Heavrin and Halliday have violated 18 U.S.C. §1951 which is a predicate act under 18 U.S.C. §1961.

74. The actions of Defendants Boone, Hinkle, Abramson, Jay, Unger, Heavrin and Halliday, complained of in Paragraphs 46 through 51 and 67 through 71, above,

were accomplished by the use of the mails and/or the telephones.

75. Defendants Boone, Hinkle, Abramson, Jay, Unger, Heavrin and Halliday have violated 18 U.S.C. §1952 which is a predicate act under 18 U.S.C. §1961.

76. Plaintiffs state on information and belief that persons acting on behalf of the Defendant City knew that Defendant Boone's services were being engaged for purposes other than merely defending Suit No. 1 at the time that the Board of Alderman originally approved the Personal Service Contract between GTBM and the City and that the Aldermen were misled when they approved the Personal Service Contract on December 26, 1989.

77. Plaintiffs state on information and belief that the Board of Aldermen were similarly misled as to the scope and nature of the services of Defendants Boone, Hinkle, Halliday and GTBM with respect to Suit Nos. 2 and 3, when the Personal Service Contract of GTBM was renewed by resolutions of the Board of Aldermen on April 10, 1990, August 14, 1990, July 23, 1991, February 25, 1992, July 28, 1992 and January 26, 1993.

78. Employees, agents or representatives of the City have repeatedly slandered and libeled Plaintiffs by publication of false statements impugning the honesty, character and ability of Plaintiff Cullinan and Plaintiff Cullinan Associates, and damaging them in their reputation, profession and business, specifically as follows:

a) June, 1992

Kathleen Partlow, spokesman for Defendant City and Defendant Abramson stated that "the Cullinans are crooks."

b) November, 1992

Andy L. Cherry, the citizens member on the Fund, and an associate of Defendant Jay, prepared and published false and misleading "comparisons" concerning the commission charges of the Fund and although knowing that there is no such requirement to do so, accused Plaintiffs of not seeking competitive bids on brokerage commissions.

c) January, 1993

Persons employed by the City state that "money is changing hands under the table" between Plaintiffs, the elected Trustees and others even though "they can't find any proof of it."

d) April 1, 1993

Defendant Abramson falsely advised Mrs. Helen Ramsey that Plaintiffs had initiated a lawsuit against the City causing the City to incur attorney's fees, and implying that Mrs. Ramsey's complaints re her bonuses were attributable to the actions of Plaintiffs.

e) May 31, 1993

Defendant Abramson, in a letter published in the Courier-Journal, referred to the "questionable management practices of the Fund," his "grave concern that police pensioners and widows of pensioners are not being well represented by the management of the Fund," and that "there are real questions as to whether the best interests of retired Louisville police officers and their widows are being served. Mismanagement of the Police Pension Fund is a legitimate

concern, best pursued through the legal system as the only way to protect the rights of the pensioners."

f) June 10, 1993

Letter from Andy L. Cherry to Senator Louie Mack stating that "the low level of benefits paid to those who receive pensions from the Policemen's Fund is almost entirely the result of questionable management practices of the Fund's Board of Trustees." Mr. Cherry again republished the same misleading and inaccurate comparisons referenced above.

g) July 26, 1993

Andy L. Cherry Letter to Editor published in the Courier-Journal on July 26, 1993, referring to "questionable investment practices" of the Policemen's Fund.

79. The actions of Defendants Boone, Heavrin, Abramson, Jay, Unger, Hinkle and Halliday were in furtherance of a scheme to deprive the Fund and its beneficiaries of the intangible right of honest services from their Trustees, money managers and brokers, and to deprive the taxpayers of the honest services of the Board of Aldermen in its review and supervision of personal services contracts. Some or all of these actions involved use of the telephones and mails in interstate commerce.

80. Defendant Jay has wrongfully refused to turn over to the Fund monies duly appropriated for it by the Board of Aldermen of the City of Louisville for fiscal year 1991-1992 pursuant to ordinance. Defendant City has, at times, blocked the payment of bonuses to beneficiaries. This has been done for the purpose of coercing the Trustees to acquiesce in the demands of Defendant Jay and Unger and to increase the economic pressure on the

Fund, and on the beneficiaries, for the purpose of forcing the Trustees to consent to the resolution of Suit No. 1. desired by the City, and in an attempt to convince the beneficiaries to remove the elected Trustees.

81. Defendants Jay and Unger have disputed the valuation of assets in the Fund in an effort to deny pension benefits to the beneficiaries of the Fund in order to exert pressure to affect the outcome of the various lawsuits, and to influence the Fund beneficiaries to replace their elected Trustees.

82. Defendants Boone, Heavrin, Abramson, Jay, Unger, Hinkle and Halliday have violated 18 U.S.C. §1341, or have conspired to violate 18 U.S.C. §1341, which is a predicate act under 18 U.S.C. §1961.

83. Defendants Boone, Heavrin, Abramson, Jay, Unger, Hinkle and Halliday have violated 18 U.S.C. §1343, or have conspired to violate 18 U.S.C. §1341, which is a predicate act under 18 U.S.C. §1961.

84. On April 23, 1993, after being faced with certain Court Orders compelling them to provide discovery, the City and Nevin entered into a Settlement Agreement with Stock Yards Bank & Trust Company of the respective claims made by them against Stock Yards Bank & Trust Company in Suit Nos. 2 and 3. The City and Nevin negotiated for, and required, dismissal of all claims made by them against Plaintiff Cullinan and Plaintiff Cullinan Associates, despite the fact that neither Plaintiff was at any time given notice of the settlement conferences, nor asked to contribute any monies to the settlement.

85. Despite concluding the settlement, Defendant City, Defendant Halliday and Defendant GTBM continued to act as if the claims of the City and Nevin against Plaintiffs were still active. Specifically, said Defendants sought and received discovery from Plaintiffs' counsel and involved Plaintiffs' counsel in the attempted preparation of Agreed Orders.

86. On May 27, 1993, the City issued a press release which falsely represented and implied that Plaintiff Cullinan had settled with the City, when in point of fact, the City was voluntarily dismissing as to him.

87. On May 27, 1993, the City issued a press release which falsely represented and implied that Plaintiff Cullinan Associates, Inc. had settled with the City, when in point of fact, the City was voluntarily dismissing as to it.

88. The purpose of the aforementioned press release was to hold the Plaintiffs out to the public in a false light, and to further defame, damage and embarrass Plaintiffs by giving the impression that one or both of them had paid to be released from the claims made in Suit Nos. 2 and 3 when in fact that was not the case.

89. Plaintiffs' counsel immediately notified Defendant Halliday that no Order should be presented to the Court purporting to accomplish the dismissal of either Plaintiff without prior notice to Plaintiffs' counsel. Despite this request, Defendant Halliday presented to the Court for *ex parte* signature an Agreed Order of Dismissal as to both Plaintiffs, which Order was entered by the Court on June 1, 1993, and thereafter used by the City in an attempt to justify the City's noncompliance with discovery Orders.

90. The *ex parte* Order of Dismissal referenced in the previous Paragraph was set aside on June 14, 1993. On July 7, 1993, Plaintiffs were dismissed from Suit Nos. 2 and 3 by Order attached hereto as Exhibit A. At no time did Plaintiffs pay any consideration for the entry of the dismissal as to them.

91. In June, 1993, the City confirmed that it had fired Defendant GTBM from its position as counsel for the City, and presumably as counsel for Defendant Nevin, in Suit Nos. 2 and 3.

92. The actions taken by Defendants were part of a scheme to accomplish various objectives, including but not limited to: a desire to prevent a suit by Louisville Firefighters to recover approximately $20 million in "excess funds" taken by the City; a desire to have the City, not the Fund Trustees, control the management of the assets remaining in the Fund; a desire to silence all opposition to the City's efforts to take actions that Plaintiffs Cullinan and Cullinan Associates and others believed would not be in the best interests of the Fund and its beneficiaries, including the taking of the "excess funds"; a desire to discredit the elected Fund Trustees by trying to force them to violate their fiduciary duties to the Fund and its beneficiaries; a desire to influence the Fund beneficiaries to remove the elected Trustees; a desire to thwart efforts to cause improvements to be made in the benefits available to the beneficiaries of the Fund; a desire to remove Plaintiffs as investment manager of a part of the Fund's assets; a desire to substitute investment managers and brokers and consultants and investment strategies of the City's choice for those duly

selected by the Fund's Trustees; a desire to replace Plaintiff Cullinan with a money manager selected by certain of Defendants who would be a friend and/or political associates of said Defendants or Defendant Abramson; a desire to cause changes in the asset allocation of the Fund's investments despite statutory prohibition of such actions; a desire on the part of Defendants Boone, Hinkle, Halliday and GTBM to obtain fees through no-bid personal service contracts awarded by Defendant City in concert with Defendants Abramson, Jay and Heavrin.

93. As a result of the actions alleged herein, Plaintiffs have been damaged in their person and their properties. Plaintiff Cullinan has sustained, and will in the future sustain, damages to his reputation and character, embarrassment, humiliation, emotional distress and mental and physical pain and suffering. In addition, Plaintiff Cullinan has lost and will lose business revenues and profits, and has lost and will lose business opportunities. Plaintiff Cullinan Associates has sustained, and will in the future sustain, damages to its reputation. In addition, Plaintiff Cullinan Associates has lost and will lose business revenues and profits, and has lost and will lose business opportunities. Plaintiff Cullinan is a shareholder of Plaintiff Cullinan Associates and as such he has been damaged due to the damages to Cullinan Associates. The damages complained of herein are yet to be fully ascertained, but are in excess of Ten Million Dollars ($10,000,000.00).

COUNT I.

[RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS CLAIM AS TO ALL DEFENDANTS OTHER THAN THE CITY]

94. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

95. Defendant City is an enterprise as defined in 18 U.S.C. §1961 whose activities affected interstate commerce.

96. Defendant GTBM is an enterprise as defined in 18 U.S.C. §1961 whose activities affected interstate commerce.

97. Defendants Boone, Hinkle and GTBM received income from the pattern of racketeering activity described herein and used or invested, directly or indirectly, part of such income in the operation of GTBM, as such constituting a violation of 18 U.S.C. §1962(a).

98. Defendants Boone, Hinkle and GTBM through the pattern of racketeering activity described herein, directly or indirectly, have acquired or maintained an interest in or control of GTBM, as such constituting a violation of 18 U.S.C. §1962(b).

99. Defendants Boone, Hinkle and GTBM are employed by or associated with GTBM and have conducted or participated, directly or indirectly, in the conduct of the affairs of GTBM through the pattern of racketeering activity described herein, as such constituting a violation of 18 U.S.C. §1962(c).

100. Defendants Abramson, Jay, Unger and Heavrin have through the pattern of racketeering activities described herein directly or indirectly maintained control of some of the affairs of the City, as such constituting a violation of 18 U.S.C. §1962(b).

101. Defendants Abramson, Jay, Unger, Heavrin, Boone, Hinkle and Halliday are employed by or associated with the City and have conducted or participated, directly or indirectly, in the conduct of the affairs of the City through the pattern of racketeering activity described herein, as such constituting a violation of 18 U.S.C. §1962(c).

102. Defendants Abramson, Jay, Unger, Heavrin, Boone, Hinkle, Halliday and Nevin have conspired to violate one or all of 18 U.S.C. §1962(a), (b) or (c), which constitutes a violation of 18 U.S.C. §1962(d).

103. Plaintiffs are innocent persons whose rights have been damaged by the activities of the Defendants as alleged in this Count.

104. Plaintiffs have been injured in their business and property as a result of the violations of Title 18 United States Code §1962 as alleged herein, and as such, Plaintiffs are entitled to recover from Defendants, jointly and severally, threefold the damages they have sustained, and the costs of this action, including a reasonable fee for their attorney.

COUNT II.

[WRONGFUL USE OF CIVIL PROCEEDINGS AS TO ALL DEFENDANTS]

105. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

106. Each and every one of the Defendants named herein has taken an active part in the initiation, continuation and prosecution of civil proceedings against Plaintiffs.

107. In doing so, each and every one of the Defendants acted without probable cause.

108. In doing so, each and every one of the Defendants acted primarily for a purpose other than that of securing the proper adjudication of the stated claim.

109. The proceedings were terminated in favor of both Plaintiffs.

110. As a result of the Defendants' wrongful use of civil proceedings, Plaintiffs have been damaged in their person and property as set forth above. As such, Plaintiffs are entitled to recover from the Defendants, jointly and severally, their compensatory damages as alleged above.

COUNT III.

[ABUSE OF PROCESS AS TO ALL DEFENDANTS]

111. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

112. Each of the Defendants has participated in the employment of legal process for purposes other than that for which it was intended by law to effect.

113. Each of the Defendants have acted willfully in using the legal process for improper purposes.

114. Each of the Defendants has jointly and severally caused Plaintiffs to be damaged in their person and property as set forth above. As such, Plaintiffs are entitled to recover from the Defendants, jointly and severally, their compensatory damages as alleged above.

COUNT IV.

[CIVIL ACTION FOR DEPRIVATION OF RIGHTS AS TO ALL DEFENDANTS]

115. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

116. Each of the actions taken by Defendants as alleged in this Complaint were under color of state law.

117. The actions of the Defendants, jointly and severally, subjected the Plaintiffs to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States in violation of Title 42 United States Code §1983, specifically the right to freedom of speech secured to the people by the First Amendment and the right not to be deprived of property without due process of law.

118. Each of the Defendants named in this Count have conspired with two or more persons to deprive

Plaintiffs of the rights set forth in the preceding Paragraph, in violation of 42 U.S.C. §1985.

119. The actions of each of the Defendants were not taken in good faith.

120. Each of the Defendants has jointly and severally caused Plaintiffs to be damaged in their person and property as set forth above. As such, Plaintiffs are entitled to recover from the Defendants, jointly and severally, their compensatory damages as alleged above.

121. Plaintiffs are entitled to recover under this Count from all Defendants, jointly and severally, the costs of this action and their attorney's fees.

COUNT V.

[INTERFERENCE WITH PROSPECTIVE AND ACTUAL CONTRACTUAL RELATIONSHIPS AS TO ALL DEFENDANTS]

122. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

123. By the actions set forth herein, all Defendants have induced or otherwise caused current, former or prospective clients of Plaintiffs either not to continue their contractual relationships with Plaintiffs or not to enter into new contractual relationships with Plaintiffs.

124. The actions of Defendants as set forth in this Count were intentional.

125. Defendants have improperly interfered with Plaintiffs' prospective and actual contractual relationships and hence are subject to liability to Plaintiffs in that regard.

126. Each of the Defendants has jointly and severally caused Plaintiffs to be damaged in their person and property as set forth above. As such, Plaintiffs are entitled to recover from the Defendants, jointly and severally, their compensatory damages as alleged above.

COUNT VI.

[PUNITIVE DAMAGES AS TO ALL DEFENDANTS OTHER THAN THE CITY]

127. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

128. The actions of each of the Defendants as alleged herein and in all of the previous Counts were in willful, wanton and callous disregard of the rights of Plaintiffs, were taken intentionally, were performed in derogation of Plaintiffs' rights, and entitle Plaintiffs to an award of punitive damages.

129. The actions of each of the Defendants as alleged in the previous Counts were taken and performed with malice and oppression toward Plaintiffs and hence entitle Plaintiffs to punitive damages pursuant to KRS 411.182.

COUNT VII.

[INDEMNIFICATION BY DEFENDANT CITY]

130. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

131. By statute and ordinance, Defendant City is required to indemnify some or all of the Defendants named herein for some or all of the claims made by this Complaint.

132. Defendant City is liable to Plaintiffs for all damages awarded against Defendants it is required to indemnify.

COUNT VIII.

[DAMAGES FOR VIOLATIONS OF MISCELLANEOUS STATUTES AS TO DEFENDANTS JAY, UNGER AND HEAVRIN]

133. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

134. The acts of Defendants Jay and Unger as complained of herein, specifically including the efforts of Jay and Unger to coerce the Trustees to terminate Plaintiffs' business relationships with the Fund with the intent to confer a benefit upon other persons or to injure Plaintiffs or to deprive Plaintiffs of benefits were taken knowingly and constituted an unauthorized exercise of their official functions. As such, these activities constituted a violation of KRS 522.020, "Official Misconduct in the First Degree."

135. The refusal of Defendant Heavrin to provide indemnity to the elected Trustees as described herein was taken with the intent to injure the elected Trustees or to deprive them of benefits provided by ordinance. In taking such actions, Defendant Heavrin knowingly refrained from performing duties imposed upon her by law. As such, Defendant Heavrin has violated KRS 522.020, "Official Misconduct in the First Degree."

136. By providing a purported indemnity to Defendant Nevin, Defendant Heavrin, with the intent to injure Plaintiffs or to deprive Plaintiffs of a benefit, knowingly committed an act constituting an unauthorized exercise of her official functions by providing an indemnity to a private person acting in a private capacity. As such, these actions of Defendant Heavrin constituted a violation of KRS 522.020, "Official Misconduct in the First Degree."

137. The actions of Defendant Jay in refusing to transfer to the Fund monies duly appropriated to it by the Board of Aldermen as described herein were taken with the intent to injure the elected Trustees or the beneficiaries of the Fund or to deprive the Trustees or the beneficiaries of the Fund of a benefit, or for the purpose of injuring Plaintiffs, and were taken knowingly. By these actions, Defendant Jay refused to perform a duty imposed upon him by law or clearly inherent in the nature of his office. As such, Defendant Jay has violated KRS 522.020, "Official Misconduct in the First Degree."

138. All of the violations of statute complained of in this Count have caused damage and injury to Plaintiffs as alleged herein. As a member of the public, Plaintiffs are in the class of persons the statutes were designed to

protect. Accordingly, pursuant to KRS 446.070, Plaintiffs having been injured by the violation of these statutes, Plaintiffs are entitled to recover from Defendants Jay, Unger and Heavrin the damages they have sustained by reason of the violations mentioned herein.

COUNT IX.

[OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS AS TO ALL DEFENDANTS]

139. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

140. By the actions alleged herein, all of the individual Defendants have, by extreme and outrageous conduct, intentionally or recklessly caused Plaintiff Cullinan to suffer severe emotional distress.

141. Defendants City and GTBM are vicariously liable for the acts alleged in the preceding paragraph.

142. All Defendants are liable to Plaintiff Cullinan for all damage occasioned to Plaintiff Cullinan by such actions.

COUNT X.

[DEFAMATION AS TO DEFENDANTS ABRAMSON AND CITY]

143. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

144. Defendant Abramson defamed Plaintiffs by the statements hereinabove set forth.

145. Defendant City, acting by and through its various employees, agents and representatives, has defamed Plaintiffs by the statements hereinabove set forth.

146. The statements hereinabove set forth are actionable per se.

WHEREFORE, Plaintiffs, R. Keith Cullinan and Cullinan Associates, Inc., demand judgment against the Defendants, City of Louisville, Jerry E. Abramson, Stuart P. Jay, Earl M. Unger, Christina Heavrin, John H. Nevin, William C. Boone, Samuel D. Hinkle IV, Culver V. Halliday, and Greenebaum, Treitz, Brown & Marshall, jointly and severally, for compensatory damages as proven by the evidence; for treble damages as to all Defendants under Count I; for punitive damages as proven by the evidence; for their costs and attorney's fees incurred in the prosecution of this action; prejudgment interest from the date each item of damage was incurred until the date of judgment; postjudgment interest; a trial by jury, and such further relief as to which they may appear to be entitled.

/s/ Ann B. Oldfather
ANN B. OLDFATHER
Oldfather & Morris
One Mezzanine,
The Morrissey Bldg.
304 West Liberty Street
Louisville, KY 40202
502-589-5500
Counsel for Plaintiffs

Plaintiff, R. Keith Cullinan, states that he has read the allegations contained in the foregoing Complaint and the statements contained therein are true to the best of his knowledge and belief.

/s/ R. Keith Cullinan
R. KEITH CULLINAN

STATE OF KENTUCKY)
) :-
COUNTY OF JEFFERSON)

Subscribed and sworn to before me by R. Keith Cullinan, this 18th day of March, 1994.

My commission expires: 11/5/95.

/s/ Margaret S. Peabody
NOTARY PUBLIC, KY STATE AT LARGE

Robert James WHITE, Plaintiff-Appellant,

v.

Barry L. HOWARD, Alleged Judge; Albert L. Holtz, Alleged "Expert Witness"/ Mediator; State Bar of Michigan; Oakland County; State of Michigan, Defendants-Appellees.

No. 93-1548.

United States Court of Appeals, Sixth Circuit.

Oct. 19, 1993.

E.D.Mich., No. 92-75337, Cohn, J.

E.D.Mich.

DISMISSED.

Before: BOGGS and SUHRHEINRICH, Circuit Judges, and WEBER, District Judge.*

ORDER

Plaintiff Robert James White, proceeding pro se, appeals from a district court order dismissing his complaint, this case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P. 34(a). Defendant Holtz has moved to strike the plaintiff's brief.

Plaintiff brought this civil rights action against defendants "Unknown Parties," Judge: Barry L. Howard,

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* The Honorable Herman J. Weber, U.S. District Judge for the Southern District of Ohio, sitting by designation.

Albert Holtz, State Bar of Michigan, County of Oakland, and the State of Michigan, alleging deprivation of rights guaranteed by several Articles and Amendments of the United States Constitution and violations of sixteen Racketeer Influenced Corrupt Organization Act (RICO), 18 U.S.C. § 1961. In a memorandum and order dated November 3, 1992, the district court granted Judge Howard's motion to dismiss on the grounds of absolute judicial immunity, *see Stump v. Sparkman*, 435 U.S. 349, 362 (1978); and Holtz's motion for judgment on the pleadings because the complaint failed to state a claim against him. The court also dismissed the State of Michigan based on Eleventh Amendment immunity. *See Welch v. Texas Highways & Public Transp. Dep't*, 483 U.S. 468, 472-73 (1987). Subsequently, the district court granted Oakland County's motion to dismiss because no claim against the county was stated in the complaint. On March 19, 1993, the district court dismissed the claims against the State Bar of Michigan for failure to serve the defendant with process within 120 days from the filing of the complaint, and dismissed the complaint in its entirety.

Upon review, we concluded that the issues raised in the plaintiff's brief lack merit and that the district court properly dismissed the case. Accordingly the order of the district court, dismissing the case in its entirety, is hereby affirmed for the reasons set forth in the court's orders dated November 3, 1992, December 7, 1992, and March 19, 1993. Rule 9(b)(3), Rules of the Sixth Circuit. The motion to strike is hereby denied.

David HANCOCK, et al., Plaintiffs,

v.

Thomas A. VONGARLEM, et al., Defendants.

Civ. A. No. 88-2474-LFO.

United States District Court, District of Columbia.

Feb. 7, 1989.

MEMORANDUM

OBERDORFER, District Judge.

Plaintiffs are farmers who were parties to contracts with the United States Department of Agriculture ("USDA"), which contracts are authorized by the Food Security Act of 1985, 16 U.S.C. § 3801 et seq. The contracts provided generally that in consideration for plaintiffs' withdrawal of certain allegedly marginal land from production and, instead, planting a cover crop pursuant to an approved conservation plan and renting the land to agencies of the USDA, the USDA would pay plaintiffs $323,470.89 for performance of the conservation plan plus rent at the rate of $16,872 annually over 10 years for a total of $168,720.

Defendants are several state and local officials with responsibilities for administration of the Food Security program. The complaint alleges that "[a]t a time and place unknown to the Plaintiffs, the Defendants determined that they would like to see the CONTRACTS modified or terminated." Complaint, ¶ 19. To this end, it is alleged, "the Defendants conspired to use their influence to cause local officials of the [Agriculture] agencies in Colorado to refuse to allow the Plaintiffs access to forms and vouchers necessary to request payments under the

CONTRACTS" *Id.*, ¶ 20. The defendants allegedly "caused communications to be made to Plaintiffs that Defendants would not allow vouchers to be delivered unless and until the Plaintiffs consented to modifications of the CONTRACTS." *Id.*, ¶ 22. Plaintiffs claim that as a consequence of the actions of defendants' alleged conspiracy, payments due to plaintiffs under the contracts were not made, with resulting damage to plaintiffs' land, crops and forestry products, as well as losses on forced sales of property. The complaint charges that defendants' conduct is actionable extortion and violates the Racketeering Influenced Corrupt Organization ("RICO") statute, 18 U.S.C. §§ 1916-8, entitling them to treble damages. Meanwhile, plaintiffs have filed a parallel action in the United States Claims Court, alleging essentially that the administrative action of defendants with respect to these contracts was arbitrary and capricious and a breach of the contracts. *Hancock v. United States*, Claims Court No. 516-88C. That case remains pending.

The matter is presently before this Court on defendants' motion to dismiss. It is well taken and will be granted. Essentially, the motion points out that the complaint nowhere alleges "what conduct of any individual is at issue. . . . [T]here is no allegation of how any of the individuals singly, or in combination, undertook any action involving any of the plaintiffs." Defendants' Reply Brief at 3. This defect is fatal to both the extortion count and the RICO count. For example, the extortion count fails to allege that defendants realized any benefit from whatever they may have done to plaintiffs. The RICO count is defective for its failure to allege any "enterprise"

or any role of defendants in any "enterprise." The heightened pleading requirements established in this Circuit before senior government officials can be diverted from their duties to defend complaints about their official conduct require dismissal of this suit. *See, e.g., Martin v. Malhoyt*, 830 F.2d 237, 253 (D.C.Cir.), *reh'g denied*, 833 F.2d 1049 (D.C.Cir.1987).

Moreover, even if the plaintiffs had alleged a cause of action, their claim flounders on defendants' qualified immunity defense. For, even if the defendants' conduct with respect to the contracts were actionable, recognition of a federal civil claim of extortion would be a new development in the law not now "clearly established." Congress created no federal civil cause of action for extortion, and the availability of suit in the Claims Court, such as now in progress there, is an alternate remedy that would have precluded an implied cause of action for extortion. *See Schweiker v. Chilicky*, 108 S.Ct. 2460 (1988). Nor has it been "clearly established" that a RICO claim will lie against federal officers or a group of federal officers on account of their official misconduct. Indeed, there is authority, albeit in another context, that such an action would not lie. *See Burke v. F.B.I.*, Civil No. C-84-2078 (N.D. Ohio, June 5, 1985), *aff'd without opinion*, 798 F.2d 1413 (6th Cir.1986). By contrast, plaintiffs cite no case establishing RICO liability of a federal officer or group of federal officers on account of misconduct of their official duties.

Assuming, without deciding, that there is personal jurisdiction over each of the alleged nonresident plaintiffs by virtue of their acknowledgements of service and the general appearance of their counsel, and that venue is

properly alleged because this District is headquarters of defendants' agencies, the complaint must nevertheless be dismissed for the reasons stated.

ORDER

For reasons stated in the accompanying Memorandum, it is this 6th day of February, 1989, hereby

ORDERED: that defendants' motion to dismiss should be, and is hereby, GRANTED; and it is further

ORDERED: that the complaint is dismissed.

Frank LOJO, et al., Plaintiffs,

v.

James PAULOS, et al., Defendants.

CIV. A. No. 95-0165 (NHJ).

United States District Court, District of Columbia.

Oct. 25, 1995.

MEMORANDUM OPINION

NORMA HOLLOWAY JOHNSON, District Judge.

Before the Court are the motions to dismiss of all remaining defendants in this case. These defendants are Ralph Regula, Edward L. Gilbert, Wyn McCoy, the LTV Defendants,[1] Barbara Lockhart, William Burga, Judge James S. Gwin, Ken Saltz, Paul Santilli, James E. Davis, Hahn Loeser & Parks, and the Federal Defendants.[2] In its Order dated October 10, 1995, the Court dismissed, pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, all of the defendants for whom plaintiffs had failed to file proof of service.

Plaintiffs have filed several motions: a motion to certify this as a class action lawsuit, a demand for jury trial, a motion for injunction, a motion to amend the

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[1] The LTV Defendants are those defendants named in the complaint as LTV Inc., LTV Steel, Inc., J & L Specialty Steel, Inc., Michael Hiemstra, Claude Konk, John McHale, Tim Medford, James Paulos, William Clark, and Gary Swenson.

[2] The Federal Defendants are J. Robert Kramer, Christian H. Stickan, Jeffrey Koftbar, John Simpson, Paul Shoquist, and Kristie Stafford.

complaint, and a motion to stay the Court's Order of September 15, 1995.

Background

Plaintiffs are former employees of Enduro Stainless Inc. They bring the 37-page complaint and all of its thirteen counts under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961, et seq. ("RICO"). In ruling on the motions to dismiss, the Court must treat the allegations of the complaint as true. *Berkovitz v. United States*, 486 U.S. 531, 540 (1988). Plaintiffs allege that from August 1984 to January 1995, defendants constituted an entity and formed a continuing enterprise:

> to defeat the Anti Trust Laws, and monopolize the stainless steel market, and control a labor union and control a newspaper, and under color of law cause a subversion of the laws, to systematically corrupt government and its agencies, and violate mail fraud and wire fraud sta[t]utes, and interstate commerce, and bankruptcy laws, to commit fraud; to conceal enterp[r]ise, the entity, and continue use of illegal funds; to deprive the former employees of Enduro of their right to liberty and property under the constitution; to defraud employees.

Complaint at p. 5, "General Allegation." It appears that almost all of the alleged facts upon which the complaint is based occurred in the mid to late 1980's in Ohio, the place where the steel mills were located and where plaintiffs reside. Plaintiffs appear to dispute the outcome of prior litigation involving Robert Newstat, former president of Enduro Steel. Newstat is currently serving a 20-

year sentence in Lewisburg, Pennsylvania, for using $ 1.5 million of Enduro money for personal use immediately prior to Enduro's declaring bankruptcy. Plaintiffs' main allegation is that defendants unlawfully caused the steel mill to close, causing plaintiffs to lose their employment.

Discussion

The Court has considered the complaint, the motions of the parties, and the memoranda in support of and in opposition to the motions. The Court will address each motion in turn.

1. Motion to Dismiss of the Honorable Ralph Regula

Ralph Regula, United States Representative from the 16th Congressional District of Ohio, moves to dismiss the complaint against him because plaintiffs make no allegations against him. Plaintiffs list him as a defendant on page 3 of the complaint, but make no other references to him. The Court agrees that plaintiffs have failed to state a claim against defendant Regula upon which relief may be granted, and accordingly will grant the motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

2. Motion to Dismiss of Edward L. Gilbert

Edward Gilbert moves to dismiss the complaint against him. Plaintiffs identify Gilbert as "a resident of [the] Akron Ohio area and former attorney to Steel Workers." Compl. at 4. The complaint alleges that, around the time the steel mill was closing in the mid

1980's, the former employees of Enduro sought "legal help from defendant Attorney Guilbert [sic], and although representing them: Guilbert [sic] stated that they must not ever disclose that LTV shipped inferior quality hot bands to ENDURO's mill and forced it to close, that it was against their own interest." Compl. at ¶¶ 53, 91. Gilbert moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the complaint fails to explain the conduct of which he is accused. Gilbert also moves to dismiss for lack of personal jurisdiction and because plaintiff has not followed Rule 8 of the Federal Rules of Civil Procedure, which requires "a short and plain statement of the claim." Plaintiffs filed a responsive brief stating:

> Defendant Guilbert [sic] lost his license for what he did to Lojo; it was never known to – BAR – that Guilbert [sic] was part of racketeering[.]
>
> Attorney Gilbert did not appear and prosecute in state court.
>
> Attorney Gilbert after seven years of providing no information stated the files were lost. Lojo could not obtain their files. For seven years the racketeering in the paragraphs in the complaint harmed Lojo.
>
> Lojo did not know there was a racketeering enterprise that is in the paragraphs in Lojo's complaint because it was fraudulently concealed.
>
> When Lojo became aware of the racketeering enterprise Lojo filed a civil RICO suit.
>
> Lojo was diligent but the racketeers by fraudulent concealment and racketeering in complaint

> were able to conceal themselves and continue to threaten and harm Lojo.
>
> Supp. Mem. [# 73] at 2.

Plaintiff has not shown that this Court has personal jurisdiction over Gilbert. For defendants who do not reside within or maintain a principal place of business in the District of Columbia, the District's long-arm statute is the only basis for obtaining personal jurisdiction. *See Reuber v. United States*, 750 F.2d 1039, 1049 (D.C. Cir. 1984). The statute provides that a court in the District of Columbia may exercise personal jurisdiction over a defendant with regard to a claim arising from the defendant's:

> (1) transacting any business in the District of Columbia;
>
> (2) contracting to supply services in the District of Columbia;
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
>
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, [or] engages in any other persistent course of conduct . . . in the District of Columbia.
>
> D.C. Code § 13-423(a)(1)-(4) (1981).

Plaintiff has not alleged that Gilbert conducted business in the District, or that plaintiff suffered injury in the District as a result of Gilbert's actions. The Court lacks personal jurisdiction pursuant to D.C. Code § 13-423(a), and must dismiss the complaint against Gilbert under

Rule 12(b)(2) of the Federal Rules of Civil Procedure. Moreover, the Court agrees with Gilbert that plaintiffs have failed to follow Rule 8 of the Federal Rules of Civil Procedure, and that plaintiffs have not set forth a claim upon which relief can be granted pursuant to the standards set forth in RICO. *See* 18 U.S.C. § 1961, et seq.

3. Motion to Dismiss of Wyn McCoy

Defendant Wyn McCoy, identified in the complaint as "a resident of Canton Ohio area and the former trustee of the Enduro's estate in Bankruptcy," Compl. at 4, moves to dismiss the complaint against him for lack of personal jurisdiction, because the complaint is barred by the statute of limitations, and because plaintiffs lack standing.

To have standing under RICO, a plaintiff must allege a direct injury to the plaintiff. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). In *Warren v. Manufacturers Natl. Bank of Detroit*, 759 F.2d 543 (6th Cir. 1985), the Sixth Circuit held:

> Plaintiff also claims injury by reason of his loss of employment. His claimed injury as an employee is not a basis of an independent cause of action under RICO because of the corporate injury. Plaintiff lost his job because Paragon was forced into bankruptcy. The alleged acts of fraud were directed not toward plaintiff as an employee of Paragon, but rather were directed to Paragon as a corporate entity or person. Assuming the truth of plaintiff's claim, the fraudulent misrepresentation was made to Paragon, not to any individual as such. Any injury Warren suffered as a result of this fraud, here

> his lost employment, was merely incidental to the corporation's injury.

Id. at 544-45; *see also Frank v. D'Ambrosi*, 4 F.3d 1378, 1385 (6th Cir. 1993). Because plaintiffs' injuries, namely the loss of employment, were indirectly inflicted upon them by the alleged RICO activity, plaintiffs lack standing to bring this action. In addition, the Court notes that the statute of limitations period for RICO actions is four years. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987). It appears that plaintiffs have missed the four-year deadline with respect to defendant McCoy because the complaint alleges that defendants initially discovered and complained about his alleged fraud in late 1986 to 1988. Compl. at ¶ 89. The complaint was not filed until 1995. Plaintiffs also have not shown that this Court has personal jurisdiction over defendant McCoy. Accordingly, the Court must grant the motion to dismiss.

4. Motion to Dismiss of the LTV Defendants

The LTV defendants move to dismiss the complaint because plaintiffs fail to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), because plaintiffs lack standing, and because plaintiffs have filed the complaint well beyond the four-year statute of limitations period. Plaintiffs allege that actions of the LTV defendants caused them to lose their employment in 1985. Compl. at ¶ 125. Plaintiffs state that they have known about the alleged conduct since 1986-89, Compl. at ¶¶ 46, 53, 60, 63, 89, 91, 116, meaning that they should have filed this complaint by 1994 at the very latest.

Plaintiffs also lack standing to bring the present action against the LTV defendants. As explained above, loss of employment that allegedly was the result of conduct in violation of RICO does not confer standing upon former employees because such injury is indirect, not direct. *Warren*, 759 F.2d at 545. Moreover, the Court notes again that plaintiffs have filed this complaint well outside of the statute of limitations period. The Court will grant the motion of the LTV defendants to dismiss.

5. Motion to Dismiss of Barbara Lockhart

Defendant Barbara Lockhart, identified in the complaint as "a resident of Canton Ohio and wife of Otis Lockhart a former employee of Enduro Stainless," Compl. at 5, moves to dismiss the complaint against her. For substantially the same reasons as set forth above with respect to the motions to dismiss of the other defendants, the Court must grant the motion of Barbara Lockhart. Plaintiffs lack standing, have filed the complaint outside of the statute of limitations period, and have not shown that the Court has personal jurisdiction over defendant Lockhart.

6. Motion to Dismiss of William Burga, Judge James S. Gwin, Ken Saltz, and Paul Santilli

Defendants William Burga, Judge James S. Gwin, Ken Saltz, and Paul Santilli, formerly representatives of a local of the United Steelworkers of America that represented a bargaining unit of Enduro's employees, move to dismiss the complaint under Fed. R. Civ. P. 12(b)(2) and 12(b)(6),

inter alia. Again for substantially the same reasons as set forth above, the Court must grant the motion to dismiss. Plaintiffs have not alleged that the Court has personal jurisdiction over these defendants, who live in Ohio. Moreover, plaintiffs lack standing and failed to bring this claim within the four-year statute of limitations period.

7. Motion to Dismiss of James E. Davis

Defendant James E. Davis, named in the complaint as "a resident of Massillon Ohio area and the editor of the Massillon Independent, a newspaper," moves to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(3) and 12(b)(6) for improper venue and failure to state a claim upon which relief can be granted. Plaintiffs allege that Davis refused to print the plaintiffs' side of the alleged controversy involving Enduro Stainless. Compl. ¶¶ 92, 115. Plaintiffs' complaint against Davis utterly fails to set forth a RICO claim. *See* 18 U.S.C. § 1961 et seq. Moreover, allowing such a cause of action may violate the First Amendment of the Constitution. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). The Court must grant the motion of James E. Davis to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

8. Motion to Dismiss of Hahn Loeser & Parks

Defendant Hahn Loeser & Parks moves to dismiss the complaint because plaintiffs filed it beyond the four-year statute of limitations period, because plaintiffs lack standing, and because the Court lacks personal jurisdiction over defendant. For substantially the same reasons as set forth above with respect to the motions to dismiss of

other defendants, the Court must grant the motion to dismiss of Hahn Loeser & Parks. Plaintiffs have not alleged that the Court has personal jurisdiction over this defendant, plaintiffs lack standing, and plaintiffs failed to bring this claim within the four-year statute of limitations period.

9. The Federal Defendants

The Federal Defendants move to dismiss the complaint pursuant to Fed. R. Civ. P. 8(a), 9(b), 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6). For many of the reasons set forth above with respect to the motions to dismiss of other defendants, such as lack of standing and plaintiffs' filing the complaint outside of the statute of limitations period, the Court must grant the motion to dismiss. In addition, the complaint does not meet the heightened pleading standard required for Bivens[3] claims. The Supreme Court has determined that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). To this end, the Court of Appeals for this Circuit has developed a heightened pleading standard for *Bivens* claims alleging an unconstitutional motive. A *Bivens* plaintiff may not merely "allege facts consistent with lawful conduct and append a claim of

---

[3] In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held that a cause of action exists against federal officials individually for violations of a person's constitutional rights while acting in a federal capacity.

unconstitutional motive," because to permit such a lawsuit to proceed would "impos[e] on officials the very costs and burdens of discovery and trial that *Harlow* intended to spare them." *Siegert v. Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), *affd. on other grounds*, 500 U.S. 226 (1991). Plaintiffs fail to identify a clearly established right which the federal defendants are alleged to have violated. Plaintiffs do not plead specific direct evidence of the federal defendants' intent to violate plaintiffs' constitutional rights. Plaintiffs' broad, conclusory allegations – that all the federal defendants were involved in some type of RICO conspiracy falsely to indict and convict and incarcerate Newstat – do not rise to the level of specificity required in a damages action against a federal official. The Court also notes that it appears that the federal defendants are entitled to absolute or qualified immunity. The motion to dismiss of the federal defendants must be granted.

10. Plaintiffs' Motions

Plaintiffs have filed several motions: a motion to certify this as a class action lawsuit, a demand for jury trial, a motion for injunction, a motion to amend the complaint, and a motion to stay the Court's Order of September 15, 1995. The Court must deny the motion to amend the complaint. According to Rule 15(a) of the Federal Rules of Civil Procedure, "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so

requires." Because plaintiffs filed their motion to amend the complaint after responsive pleadings had been filed, the matter is left to the Court's discretion. The Court determines that it would not be appropriate at this stage in the litigation to allow plaintiffs to amend the complaint. The Court denies the remaining motions of plaintiffs as moot.

Conclusion

For the reasons set forth above, the Court grants the motions of defendants to dismiss and denies the motions of plaintiffs. This case is hereby closed. An appropriate Order shall issue.